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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN H. BRADLEY

Petitioner,

vs.

SECRETARY OF DEFENSE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 5, 1984

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QUESTIONS PRESENTED

1. Where an executive agency invokes federal law to terminate an engineer's job, and said law provides an express right to a due process appeal PRIOR to termination, was the agency denial of such appeal (amid mitigating circumstances) properly relegated to the status of non-issues by the lower court?

2. Where a vital U.S. defense vulnerability was the subject of a Federal engineer's whistleblowing action before Congress and the National Security Council, was the public interest improperly subordinated to the agency interest in firing the engineer?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, John Bradley, acting pro se, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 11, 1984. Petitioner's appeal to the Fourth Circuit was timely filed in that Court thirteen months earlier on June 10, 1983.

OPINION BELOW

The opinion of the appellate court, decided on July 11, 1984, was a one-page unpublished, per curiam opinion affirming the memorandum opinion of the district court dated February 15, 1983. This action stems from the March 8, 1982 revised opinion of the Merit Systems Protection Board (MSPB) terminating the engineer's job with the Department of Defense. The initial opinion of the MSPB,

then known as the Federal Employee Appeals Authority (FEAA), was vacated and the case assigned for a further hearing and a new adjudication in response to a Petition To Reopen the engineer's case.

Although the Petititon To Reopen was deemed to be untimely, the MSPB issued an Opinion And Order to reopen the case, *on its own motion*, "(s)since the charges, on their face, show a 'mixed motivation' for appellant's removal, one of which involved constitutionally protected conduct". The Board Chairwoman also found that petitioner ha. been "unduly restricted at the hearing in the development of the evidence supporting his claim of reprisal". A copy of the MSPB Opinion And Order is included in the Appendix as Exhibit D, page 27a.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. 1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First Amendment, and Fifth Amendment to the United States Constitution; United States Code, Title 5, Section 4301, et seq.; Title 5, Section 771, and The Code of Ethics For Government Service, House Concurrent Resolution 175, 85th Congress, 2d Session, 1967, are set forth in the Appendix as Exh. F.

STATEMENT OF THE CASE

Pursuant to Rule 21.1(i) of the Rules of this Court, the basis for federal jurisdiction in the court of first instance (district court) is the Administrative Procedures Act, 5 USC 701, et seq.

This case is directly concerned with a vital U.S. defense computer network with which petitioner was employed as the senior test engineer. The priority mission of the network was to support the President, during the period immediately preceding a crisis such as a nuclear attack on the United States.[1] On or about April 28, 1977, approximately three months before the computer network was to become operational in support of the President, the engineer went to the National Security Council to report management cover-up of a crucial technological vulnerability in that network. It was failing 50% of the time, and the agency supervisor responsible for the engineering development of the project, a clinical psychologist, held no academic degree in engineering or in any field of computer science. Petitioner's attempts to communicate with the supervisor about the reliability problem were repeatedly frustrated.

Less than three weeks after his visit to the National Security Council, the engineer was issued firing charges. Word had leaked back to the agency responsible for the network development that the engineer had "blown the whistle". The agency quickly retyped old charges which had been used in an earlier personnel action to deny petitioner his regular biennial pay raise, and added a third charge ("making false and misleading statements") condemning his expression of professional opinion about the vulnerability matter.[2]

NOTE 1: Informally known as the President's crisis computer network, this system was formally named the World-Wide Military Command and Control System (WWMCCS). Throughout the period of time covered by this case, the defense computer network was governed by Dept. of Defense Directive 5100.30, December 2, 1971, promulgated by the Deputy Secretary of Defense, *MSPB Hearing Exhibit A-24*, and mandating reliability as a priority concern.

NOTE 2: Shortly after the first Civil Service Commission hearing was concluded, the U.S. General Accounting Office formally requested access to the engineer's case file (Exh. 15, Petition To Reopen Hearing), and conducted an independent investigation of the network's vulnerability. The engineer's technological warning of two years earlier, was fully corroborated by the GAO's investigative Report To The Congress (MSPB Exh. A-36, page 82).

The record shows that the engineer had exhausted all channels within the agency before seeking responsible management attention through his Congressman and the National Security Council. At no time did the engineer go to the public media while he was employed by the agency. In November 1979, however, a false alarm from one of the key defense computer sites comprising the network (NORAD), catapulted the nation into a nuclear war preparedness scenario which was extensively covered by the media, and denounced by the Soviet Union as deliberate. Appendix G. On October 30, 1980, an investigative report by the U.S. Senate revealed that 147 false alarms had occurred in the past 18 months. Appendix G. The President's crisis computer network had become fodder for the cannons of cartoonists.

On appeal of his firing, the Civil Service Commission (FEAA) ruled the third charge to be a violation of petitioner's First Amendment rights,[3] but refused to consider the falsity of the charge itself. The engineer was thus transfixed with a stigma from which he was not permitted to defend himself. The firing was sustained solely on the basis of the two PREVIOUSLY-USED charges. The res judicata effect, in which petitioner was charged THREE times, and penalized twice, FOR THE SAME CHARGES is seen in the record of the following agency actions:

1. Proposed Denial of Within-Grade Salary Increase . . . . . Mar. 21, 1977
2. Proposed Unsatisfactory Performance Rating . . . . . May 4, 1977
3. Proposed Removal, Notice of . . . . . May 19, 1977
4. Agency ruling to deny Within-Grade Sal. Incr. . . . . May 23, 1977
5. Agency ruling to fire petitioner . . . . . June 24, 1977.

Note 3: This third charge (First Amendment, free speech) was overturned by the first Civil Service Commission hearing, along with some parts of the residue charges, leaving a 62% residue of the original sub-charges for which petitioner had already been penalized by denial of his biennial within-grade salary increase.

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This chronological sequence is particularly revealing in that none of the claims on which the agency based its firing action occurred after March 12, 1977, but both of the agency actions to fire the engineer (May 4th and May 19th) used identical charges and occurred shortly after his April 28, 1977 visit to the National Security Council.

On November 29, 1979, the engineer petitioned the Civil Service Commission (now Merit Systems Protection Board) to reopen his case for the "new and material evidence" of the GAO report, inter alia.[4] The petition was considered untimely but the MSPB Chairwoman reopened the engineer's case, sua sponte, noting that petitioner had been "unduly restricted" in his defense presentation and that "the charges, on their face, show a 'mixed motivation' for appellant's removal." *Opinion And Order*, Oct. 17, 1980, page ~~30a~~. 29a *Appendix Exh. D.* The Chairwoman further held that "the Field Office should have developed the record and analyzed the evidence in light of *Mt. Healthy*, and other relevant case law." *Id.*, page ~~27a~~. 29a

The question which arises in Argument I, herein, is why did the agency invoke the law (5 USC 4301 et seq.), by memo notice of charges to petitioner, promising 90 days interim assistance (and removal, etc. if he did not improve), and then abandon that law at the 15th day to reissue the same charges under a more stringent law (not specified) allowing only thirty days for removal and adding a Constitutionally impermissible charge. In the reopened MSPB hearing, the administrative law judge recognized the connection between petitioner's free-speech exercise and his

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Note 4: THREE YEARS later, a similar report on the same computer network would be issued with the title, "WWMCCS—A billion dollar failure", (Part III), confirming that the identical vulnerability which the engineer had brought to the attention of the National Security Council on April 28, 1977, had been perpetuated into the operational phase for use by the President. *House Report No. 97-449*, 97th Congress, 2d Session, March 8, 1982, Committee On Government Operations.

firing; *Initial Decision On Reconsideration*, March 8, 1982, (Appendix E, page 37a):

> "The causal connection between appellant's written criticisms to his supervisors and the subsequent adverse actions is easily demonstrated by the fact that the agency considered this protected conduct as one of the charges supporting its decision to remove the appellant. Further support for finding a causal connection can be gleaned from the time sequence in which these events occurred. They took place on February 25, 1977, and on March 12, 1977. Subsequently, the agency issued three Notices: (1) Denial of Within-Grade Salary Increase on March 21, 1977, (2) Warning of Unsatisfactory Performance Rating on May 4, 1977, and (3) Proposed Removal on May 19, 1977.

At the re-hearing ordered by the MSPB Chairwoman, the administrative law judge again declined to consider evidence of whether the engineer was right or wrong about the vulnerability of the defense computer network (MSPB Tr. 7, Vol. I, lines 1-10).[5] The engineer's firing was thereupon sustained, by the *Mt. Healthy* rule, on a faulty basis of re-used charges, newly re-labelled as "inefficiency" and "resistance to competent authority". Further, the MSPB presiding official DECLINED TO CONSIDER ANY DEFENSE PRESENTATION BY THE ENGINEER REGARDING THESE CHARGES DURING THE SECOND HEARING. *MSPB Initial Decision On Reconsideration*, p. 2 (Appendix Exh. E, page 32a).

Note 5: Cover-up during the engineer's appeal hearing had been rampant. During the first hearing, the agency supervisors, testifying falsely under oath, stated that the defense computer network was not to become operational (FEAA Tr. 239) to minimize the crucial reliability deficiencies (Exhibit 3, *Petition To Reopen Hearing*). The record reveals that the network DID become operational three weeks after the engineer was fired (MSPB Exh. A-58, and A-18). The cover-up included testimony that the reliability problem did not exist (FEAA Tr. 32); that there was not even a reliability requirement (FEAA Tr. 545), and finally attributing the blame for the reliability problem to the engineer (FEAA Tr. 226 and 277). See footnote 1 regarding official mandate on reliability.

This restriction was particularly prejudicial to the engineer's cause of action, since he had been "unduly restricted" at the first hearing by the FEAA hearing examiner. The MSPB Chairwoman had confirmed such restraint and petitioner's case had been reopened specifically to cure that defect.[6] *MSPB Opinion And Order*, Oct. 17, 1980, Appendix D, page 29a. No new firing charges were alleged by the agency, nor were there any. Petitioner submits, as a matter of record, that all of the charges were without merit, and if not restrained he would have proven so. As the record now stands, five of the 13 claims charged by the agency against the engineer were proven unsupportable and overturned.

On March 8, 1982, the administrative law judge ruled to sustain the agency firing action on the basis of the re-used charges. Upon timely appeal, the federal district court deferred to the administrative law court, and ruled in summary judgment adverse to petitioner on February 15, 1983. On June 10, 1983, petitioner filed a timely appeal to the Fourth Circuit, and approximately one year later on July 11, 1984, the appellate court issued a one-paragraph, per curiam and unpublished ruling, affirming the district court ruling and denying petitioner's request for oral argument.

Note 6: The Supreme Court has ruled specifically in direct conflict with such a removal defect:

> It follows that an employee who has been deprived of a procedural right by the Commission must be regarded as not yet lawfully removed and thus entitled to his pay otherwise due. No more than in the case of a procedural violation by the employing agency . . . is there a requirement that the employee show that he would not have been discharged had he been accorded his procedural rights by the Commission. *Greene v. U.S.*, 376 U.S. 149, 162, 84 S.Ct. 149 (1964); *Silver v. New York Stock Exchange*, 373 U.S. 341, 365, 83 S.Ct. 1246 (1963).

REASON FOR GRANTING THE WRIT

The decision of the lower federal court, affirmed by the Fourth Circuit against petitioner, is in conflict with applicable decisions of this Court and appellate courts below, on the matter of the denial of due process in terminating a federal employee's job.

ARGUMENT I

Summary

This argument is concerned with the interaction of two laws,—(1) the Administrative Procedures Act (APA) which authorized the lower court's review of a violation of, (2) the Performance Rating Act. 5 USC 4301 et seq. (1976) The latter Act was invoked by the DoD agency in a memo of May 4, 1977, promising the engineer 90 days in which to improve his performance, subject thereafter to possible removal.

Fifteen days later, the agency aborted the 90-day promise, and the Performance Rating Act which it had invoked, by issuing a Notice of Proposed Removal in a memo of May 19, 1977. The SAME charges were then reissued under a more stringent 30-day rule, with the addition of one charge ruled later to be a First Amendment violation. The engineer asserts that the APA was erroneously applied by the lower courts in relegating another Constitutional violation (Fifth Amendment) to a non-issue. 5 USC 706.

A due process right to a pre-termination hearing was explicitly provided by both agency regulation and the law, after the 90 days had run. 5 U.S.C. 4305. Appendix Exh. F. On petition before this Court, the engineer asserts that denial of such a Constitutional right was prejudicial error denying him judicial consideration of a Constitutional issue vital to his case. Fifth Amendment (due process).

Violation of Due Process.

The district court of Alexandria, Va. held that petitioner's

appeal of an improper job termination action, initiated in the district court of the District of Columbia under 5 U.S.C. 702, 706 (Initial Complaint, April 19, 1982), would be properly heard under the Administrative Procedures Act, 5 U.S.C. 701 et seq. (1976). *Order of Dec. 17, 1982.*

At subsection (2) of 5 U.S.C. 706, the APA provides the Scope of Review which the district court was required to recognize, but which it erroneously neglected, with substantial prejudice to petitioner's cause of action. Specifically, subsection (2) of the Act provided two parts under which the engineer was entitled to have his case heard, to wit: the "procedure required by law" and matters concerning a "constitutional right".

The "procedure required by law" which the agency failed to observe, was promulgated in the agency's own regulation at DCA Instruction 220-120-3, Civilian Employee Performance Rating Plan. *Exh. 9, Brief For Appellant*, June 10, 1983. It was mandated by contemporaneous law at 5 U.S.C. 4301 et seq. (1976), from which the agency regulation was derived.[7] Petitioner asserts that the agency's violation of its own regulation, as well as its concurrent violation of the law, were erroneously ruled by the lower courts to be non-issues. District court *Memorandum Opinion*, February 15, 1983. See Appendix B, page 10a.

The "constitutional right", noted above in the Scope of Review at Sect. 706, part (2)(B), was the subject of the second restraint ruled erroneously by the lower court to be a non-issue. *Memorandum Opinion*, Appendix B, page 13a. In its ruling, the district court disregarded the engineer's

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Note 7: The Fifth Circuit has ruled in conflict with the Fourth Circuit ruling in the present case, that "(i)t is equally well established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it." *Government of Canal Zone v. Brooks*, 427 F.2d 346, 347 (1970).

Constitutional right to a pre-termination hearing (due process) at the agency level following the completion of the 90-day probationary period, in the following cursory rejection:

> "The plaintiff seeks to add to those issues in this appeal the propriety of not giving him 90 days to improve his performance. . . . These were not before the MSPB on remand, and will not be considered here on appeal. . . ."

In reaching the above conclusion, the lower court had apparently overlooked the ruling of the MSPB administrative law judge on this point. MSPB Hearing Transcript, Vol. I at page 166, lines 19-25:

> MSPB Judge McCarthy: You can present this to the Board and to me in argument. First of all, your legal argument is that the 90-day period was mandatory and apparently couldn't be interrupted. Agency officials who testify see it differently. So that's a legal dispute and we can't settle that at the moment, but you can argue it after the evidence comes in, after all the testimony is taken.

Later, the issue was again recognized, and ruled upon by the administrative law judge. *Initial Decision On Reconsideration*, Appendix E, page 39a. It is this ruling, cited below in relevant part, which petitioner presented for review to the district court:

> "Appellant believes he was promised a period of 90 days to improve his performance, as indicated in the advance warning of unsatisfactory performance rating issued May 4, 1977; that the agency broke its promise when it issued its Notice of Proposed Removal on May 19, 1977, only 15 days into the 90-day warning period. . . ."

The basis for the engineer's belief (sic) that he was promised 90 days to improve his performance was the agency's own memo to him, dated May 4, 1977. *FEAA Exhibit 73.* See also *Petition To Reopen Hearing* at Exhibit 12:

> YOU WILL BE GIVEN 90 CALENDAR DAYS from the date of your receipt of this notice in which to improve your performance. IF YOU FAIL to correct the deficiencies noted in paragraph 1, your performance will be considered unsatisfactory *AND* APPROPRIATE CORRECTIVE ACTION, INCLUDING REASSIGNMENT, DEMOTION OR SEPARATION, WILL BE UNDERTAKEN. (Emphasis added.)

The record shows that the regulation cited in Reference (a) to the agency memo of May 4, 1977, noted above, was DCA Instruction 220-120-3. This record also confirms that the law invoked on page 2 of that agency regulation was 5 U.S.C. 4301 et seq. Despite this legal authority of both statute[8] and regulation that had been invoked by the agency on its own option, the MSPB admin. law judge ruled that,—

> There was no legal requirement that the removal action be delayed to permit the ninety-day warning period to run its courts—that period was prerequisite only to the assignment of an unsatisiactory rating." MSPB *Initial Decision On Reconsideration*, March 8, 1982, page ~~10.~~ 40a

It has been long held that a statutory right cannot be taken away by administrative fiat. *Armendariz v. Hersey*, 295 F.Supp. 1351 (1969). In the case at bar, the district court and affirming Fourth Circuit appellate court ruled against petitioner in conflict with the D.C. appellate court. *Meehan v. Macy*, 392 F.2d 822, 383 (1968):

Note 8: A careful reading of *Schaefer v. U.S.*, 633 F.2d 945 (Ct. Cl. 1980) at page 948, reveals the conflict between the lower courts in the present case and the *Schaefer* court regarding the "alternative and mutually independent means of firing an employee":

> "The need for notice, and actual rating of 'unsatisfactory,' is in fact a precondition to removal under the Performance Rating Act, 5 U.S.C. 4301 et seq. (1976); specifically 5 U.S.C. 4304(b)."

See also the conflict between the administrative tribunal in *Allen v. Department of Defense*, infra, and the MSPB ruling, supra, in the case at bar.

> "Ordinarily the courts will accept the interpretation an agency gives to its own regulations. However, when a disciplinary proceeding involves an issue of fair warning, additional considerations are involved. What notice was given to this employee by this regulation?

In *Washington v. U.S.*, 147 F. Supp. 284, 288 (1957), the lower courts ruling against petitioner are again seen to be in conflict with other judicial arenas, holding that the "fact that he was subsequently given a de novo hearing at a higher level does not cure this procedural defect. Since the agency did not follow the procedure laid down by Congress, plaintiff's discharge was unlawful."

The Opinion and Order of the Merit Systems Protection Board in *Allen v. Department of Defense*, MSPB Docket No. DC75299084-ADD, Opinion And Order, January 5, 1981 is cited in relevant part from page 3 to show that the administrative law judge ruling herein was in conflict with the MSPB's own case precedent, Appendix C, page ~~26a.~~

> The presiding official found in his initial decision that the agency had notified the appellant that he had 90 work days to improve his performance, but the agency then decided to remove him after 82 work days, during which time he was incapacitated by a back injury. In our view, the agency's failure to afford the appellant any reasonable opportunity to demonstrate acceptable performance "prolonged the proceeding" and "severely prejudiced" the appellant. See *Allen v. U.S. Postal Service*, MSPB Docket No. AT075299011 at 17 n.36 (July 22, 1980). We find, therefore, that this procedural error is not only harmful, but also gross, warranting an award of fees "in the interest of justice." Id.

Long-standing rulings of this Court are in sharp conflict with the Fourth Circuit ruling in the present case. In *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499 (1954) and *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968 (1959) the high Court ruled to vacate the discharges of government employees. Mr. Justice Frankfurter, concurring, expressed the Court's ruling in *Vitarelli* as follows:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. See *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S.Ct. 454, 459, 87 L.Ed. 626. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403.
>
> "This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 WAS INVOKED BUT NOT OBSERVED." (Emphasis added.)

The record is clear in the present case that the agency invoked the law under 5 USC 4301 et seq., AT ITS OWN OPTION, and then aborted that law at the FIFTEENTH DAY, thereby denying petitioner herein the due process hearing which that law provided at the end of the 90-day period.[9] In *U.S. v. Heffner*, 420 F.2d 809 (1970), the Fourth Circuit reversed the district court ruling and under the *Accardi* doctrine, established the Fourth Circuit judicial policy on the essential matter of the due process violation. *U.S. v. Heffner*, at 812:

> The failure of the Board and of the Department of Justice to follow their own established procedures was held a VIOLATION OF DUE PROCESS. (Emphasis added.)

NOTE 9: In a similar conflict with its own Notice of Proposed Removal, the agency wrote in that May 19, 1977 memo to petitioner, that,—

> "You will be allowed ten calendar days from the date of your receipt of this notice to submit your answer"
>
> "As soon as possible after your answer is received, or after expiration of the ten-day limit ... you will be given a written decision."

(Note 9 continued on page 14)

Petitioner invites the attention of this Court to the Court of Claims ruling in *Ryder v. U.S.*, 585 F.2d 482 (1978). In the *Ryder* court, the ruling is clearly in conflict with the lower courts' ruling in the present case. *Ryder* is cited for the premise that the lower courts erred in ignoring the serious procedural curtailments described above in connection with violation of 5 U.S.C. 4301 et seq., and emphasizing instead, the MERITS of the firing charges framed against the engineer. In the reopened hearing, however, the administrative law judge had denied the engineer the right to defend himself on the merits of the two remaining charges. Initial Decision On Reconsideration, Appendix E, page 32a.

> It is important to note that the Board's Order (to reopen the hearing for the application of *Mt. Healthy*) does not disturb the Initial Decision's finding that charges (1) and (2) were supported by the evidence and that they constitute good cause for removal.

Ryder addresses that point squarely, and in conflict with the lower court herein, at 487-488, joining with it, the case precedents which it has established in over a decade of rulings; *Garrott v. United States*, 340 F.2d 615 (1965); *Cunningham v. United States*, 423 F.2d 1379, 1385 (1970); *Jones v. United States*, 203 Ct.Cl. 544, 550 (1974); *Gratehouse v. United States*, 512 F.2d 1104 (1975) cert. denied, 434 U.S. 955, 98 S.Ct. 480, 54 L.Ed.2d 313; *Shaposka v. United States*, 563 F.2d 1013, 1018 (1977):

(Note 9 continued)

Approximately *four* days after petitioner's ten-day period had begun, on May 23rd, petitioner received another agency memo adversely ruling on the same charges as they had been used earlier to deny petitioner's within-grade salary increase. By this action, the agency denied petitioner any reasonable consideration of his answer to the firing charges. The removal action was thus rendered as "a matter already decided" in conflict with contemporaneous Commission policy (Fed. Personnel Manual at FPM Suppl. 752-1, Sect. S4-4a) as well as case precedent cited therein. (*Elchibegoff v. U.S.*, 106 Ct.Cl., 541 (1946):

> "A notice must make it clear that it concerns only a proposed action and not a matter already decided (see Elchibegoff v. U.S.) . . ."

> "... where a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal ... of legality, leaving the employee on the rolls of the employing agency and entitled to his pay until proper procedural steps are taken toward removing or disciplining him. IN THAT SITUATION, THE MERITS OF THE ADVERSE ACTION ARE WHOLLY DISREGARDED."

MITIGATING CURCUMSTANCES:
DENIAL OF CRUCIAL JOB RIGHTS
THROUGHOUT THE PERIOD OF THE FIRING
CHARGES.[10]

Further evidence of the agency's disdain for established law and the "serious procedural curtailment" noted in *Ryder*, supra, was preserved for review on appeal to the Fourth Circuit. *Brief For Appellant*, June 10, 1983, page 34. The Code of Federal Regulations provides the mandate that if an employee has a grievance about job conditions under which he is working, he has a right to have that grievance promptly heard and resolved *within 90 days*. 5 C.F.R. 771.110. Under that law, the engineer initiated the informal stage of his grievance in May 1976, a full year before the agency issued firing charges. He was denied resolution of the grievance throughout the final year of his employment. The agency conceded the grievance neglect, but attributed the blame for violation of the grievance law to the Grievance Examiner, said examiner having been selected by the agency itself. The agency director's letter addressed to the engineer at his home two months AFTER the firing is seen at FEAA Exhibit 83, at page 2:

> "I am cognizant of the fact that you initially submitted your formal grievance on 10 August 1976 and that this decision is being issued more than a year later. Although I am not pleased that this inordinate (sic) amount of time has been required to bring this case to a close, rest assured that this Agency did everything it could to expedite the process. As you are aware, the grievance examiner was an employee of another agency and not subject to my administrative control."

NOTE 10: Washington v. United States, 147 F.Supp. 284, 288 (1957) is cited for the rule on "mitigating circumstances":

(Note 10 continued on page 16)

Petitioner asserts that both the Grievance Examiner and the agency were in conflict with contemporaneous law. He further asserts that, by the unusually long period of the grievance neglect, the agency contributed more to the employment problem, described in the firing charges, than that which it now attributes to the employee. This Court has addressed the conflict directly in *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10, 92 S.Ct. 1411, 1417, 31 L.Ed.2d 658 (1972):

> The government cannot disavow responsibility for the conduct of one of its agencies nor the conduct of an agency employee because the government must be treated as one entity. A citizen has the right to expect fair dealing from his government . . . and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. *United States v. Moss-American, Inc.* 78 F.R.D. 214 (1978)

Throughout the year preceding his firing on July 1, 1977, the engineer sought in vain to persuade the agency to resolve the administrative grievance which he had initiated in May 1976. FEAA Exhibits 87, 88, 92, and 93. The matters about which the engineer had grieved later became the subject of firing charges against him and were thus directly related to his on-the-job performance, e.g., repeated exclusion from job-related meetings directly affecting his officially assigned duties, failure to provide the engineer the all-important Individual Development Plan etc. FEAA Exhibits 34, 35, 36, 38, 39, 41. In the engineer's view, they were crucial to his relationship with his supervisors because of their daily impact on his job performance. MSPB Exhibit A-8(e), Informal Grievance, May 17, 1976.

(Note 10 continued)

> To "answer" to charges, or claims, one need not necessarily plead the general issue, denying that he did the things which he is alleged to have done. He may plead in confession and avoidance, and that is an answer, in law, and in life. In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged.

This matter was raised at the first Commission hearing on the engineer's firing, but the FEAA hearing examiner rejected the engineer's argument because he "has cited no regulation in support of it and we are aware of none." This was demonstratively an erroneous ruling, since the engineer had brought the matter to the attention of the FEAA examiner by citing the agency's own regulation on grievance, as well as citing the Federal Personnel Manual reference of Chap. 771, supra, and the law at 5 C.F.R. 771.110(a). Appellant's *Memorandum Of Applicable Regulations, Directive And Policies*, May 5, 1978.

Civil Service Commission policy on employee grievances is set forth in relevant part at Federal Personnel Manual, Chapter 771, Sect. 3-6a(2): (See Appendix F, herein)

> An employee's grievance may or may not be objectively justified. What is important is that the grievance is real to the employee. When the grievance is well founded, MANAGEMENT HAS BOTH A DUTY AND A NEED TO ELIMINATE THE CAUSE. When the grievance is not well founded, it is equally important to reach an understanding based on the full facts, SINCE A DISSATISFIED EMPLOYEE OFTEN IS AN UNPRODUCTIVE EMPLOYEE. (Emphasis added.)

It is clear from the foregoing Commission policy that the agency knew, or should have known, that the act of neglecting the engineer's grievance would impact his job performance adversely.

Thus, the engineer was caught between the Government's rule for firing inefficient employees and Federal grievance law which could have provided the means of improving his efficiency. It was an elusive hydra-headed bureaucratic monster, acting in bad faith.[11]

NOTE 11: In the *Chester* case, (Exhibit 9, Plaintiff's Motion For Summary Judgment), the ALJ was decisively in conflict with the lower courts herein: (Note 11 continued on page 18)

A conflict is seen between the ruling of the Fourth Circuit in the present case and the D.C. appellate court in *Meehan v. Macy*, 392 F.2d 822, 825 (1968): "an agency does not have untrammeled freedom to promote regulations; to acquiesce in, if not induce, their violation by desuetude; and them come crashing down on the offender with a discharge from employment." The question which remains is,—if the agency had opted to comply with the grievance law, 5 C.F.R. 771, would petitioner's job performance have been satisfactory? Petitioner submits that the answer can only be conjectural because the agency opted NOT to comply with the law, choosing instead to prepare firing charges based, in part, on the matters which the engineer had grieved.

REASON FOR GRANTING THE WRIT

A federal district court has decided an important federal question, affirmed by the Fourth Circuit, in a way which conflicts with applicable decisions of this Court and lower courts of other circuits. The question is intimately involved with the firing of a federal computer systems engineer because he reported a crucial U.S. ~~devense~~ defense vulnerability to higher management, and the National Security Council.

(Note 11 continued)

At page 5 of the *Chester* ruling,—". . . (A)s little sympathy as I feel for Mrs. Chester's position, the Government's position is even less tenable. The Government's action in serving notice of proposed removal for her refusal to accept the reassignment to Atlanta at a time when she had a grievance pending as to that assignment demonstrates a total lack of good faith on the Government's part."

And at page 8 of the *Chester* ruling, the ALJ held that,—"Under these circumstances, I am of the opinion, and so find that the Government acted in bad faith in pursuing the removal action before resolving the formal grievance which Chester had filed against her reassignment to Atlanta."

ARGUMENT II

Background.

The single most important question in the present case is whether a federal agency interest in imposing the ultimate discipline upon a computer systems engineer should rise above the priority of the public interest in an egregious national security threat which the engineer reported to higher management authority. The lower courts, beginning with the administrative tribunal (MSPB), concede that the engineer met his burden of proof in showing that his so-called "whistleblowing" was *"a significant factor" in the agency's decision to fire him.* The federal question evolves, momentarily, to the point of whether the engineer was really competent to assess the national security threat.[12] On this point the district court freely acknowledges that the engineer was of "exceptional expertise in the field involved in the project on which he was working". *Memorandum Opinion*, Feb. 15, 1983. Appendix Exhibit B, page 13a.

The federal question evolves again: did other federal experts subsequently corroborate the engineer's assess-

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NOTE 12: Petitioner is a World War II veteran, honorably discharged from the U.S. Submarine Service with Good Conduct Medal, inter alia. (FEAA Exhibit 53) Accordingly, and with respect to his tenure in the Federal Service, he is entitled to certain procedural rights under the Veterans' Preference Act of 1944 as amended, 5 U.S.C. 7511, 7512 and 7701. In May 1972, petitioner was assigned on a promotional transfer (GS-14) within the Department of Defense, primarily in recognition of a long experience record, highest possible supervisory ratings for cooperation with management (rejected MSPB hearing Exhibit A-45), and two books he had written, one of which had been selected a year earlier by the Book-of-the-Month Club in the computer field. Programmers Guide To The IBM System/360. A second book, *The Vulnerability Of The Digital Computer*, particularly established petitioner as a specialist in the technical area of the President's crisis computer network about which he reported in the case *sub judice*, to the National Security Council. On July 1, 1977, this veteran's employment as a senior computer systems engineer was terminated after approximately twelve years of service, allegedly "for the efficiency of the service".

ment of the national security threat? On this point, a priority correction of the national security vulnerability was shown subsequently by independent government authority (U.S. General Accounting Office) to be of paramount importance to the public interest. Again, evidentiary documents reveal the answer is favorable to the engineer. *Report To The Congress* by the GAO: "The World Wide Military Command and Control System—Major Changes Needed In Its Automated Data Processing Management and Direction", LCD-80-22, December 14, 1979. *Appellant's Exhibit A-36, MSPB Re-hearing.*

Further, the Member Conduct Committee of the engineer's professional association (Institute of Electrical and Electronics Engineers), and its Chairman (attorney) voted unanimously after an exhaustive review of the case documents that he acted with proper regard to his professional ethics in going to higher management authority to reveal the cover-up. Appellant's Exhibit A-63 dated April 29, 1980 (p. 10), *MSPB Hearing:*

> Section 1 of Article IV of the IEEE Code of Ethics requires that the Institute members protect the safety of the public and speak out against abuses affecting the public interest. We believe that Mr. Bradley, mindful of the purpose of the WWMCCS program, correctly perceived potential problems related to reliability of a system intended to become operational, which problems were within his area of competence and responsibility, until through a series of reassignments he was effectively removed from meaningful participation. He voiced his concerns within the Agency, and finally made the choice to relate his concerns to others within the government, namely to the National Security Council."

In this argument, the engineer submits that the broader concerns of the *Pickering*[13] balance made that legal prece-

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NOTES 13: Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968)

dent more appropriate to the case at hand than the *Mt. Healthy*[14] rule applied by the administrative law court (MSPB). Nonetheless, petitioner urges this Court to reverse the ruling of the lower court and thereby set a precedent which goes beyond *Pickering* and *Mt. Healthy* because neither of these cases or their contemporaneous counterparts adequately protect engineers or scientists from the "chill" of reporting national security threats. Indeed, some commentators have described the "chill" as an In Terrorem Effect, noting that the "most serious defect of the *Mt Healthy* test is that it exacerbates the chilling effect of reprisals on public employees exercising First Amendment rights". *Yale Law J.*, Vol. 89, 391, 1979.

WHERE FIRING CHARGES HAD BEEN REPEATEDLY USED IN TWO PRIOR PERSONNEL ACTIONS AND A NEW CONSTITUTIONALLY-IMPERMISSIBLE CHARGE WAS THEN ADDED TO EXECUTE THE ULTIMATE DISCIPLINE (FIRING) AGAINST PETITIONER, SHOULD REPRISAL MALICE BE INFERRED?

When the Chairwoman of the Merit Systems Protection Board ordered, *sua sponte*, that the engineer's case be reopened in October 1980, the third of the three firing charges had already been overturned. That charge was declared a violation of the engineer's First Amendment (free-speech) rights. *Federal Employee Appeals Authority (FEAA) ruling of August 9, 1978, at 29.* The engineer's firing was thereupon sustained by the FEAA examiner on the basis of the remaining two charges, weakened though

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NOTES 14: Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)

they were by the overturning of multiple sub-charges (also "claims" or "specifications") within the two-charge residue.[15]

Upon rehearing (MSPB), the presiding official again overturned the third charge but sustained the firing on the basis of the two residue charges, EVEN WHILE DENYING PETITIONER REVIEW OF THOSE RESIDUE CHARGES. On motions for summary judgment, the government argued that the residue charges constituted compliance with the "substantial evidence" test for firing the engineer. Petitioner protested, noting that the residue charges were word-for-word duplicates of an earlier personnel action, whose labels (titles) had been cosmetically altered and then re-issued to effect the more serious agency action of job termination.[16]

NOTE 15: On March 20, 1981, the agency stipulated before the Merit Systems Protection Board as to the parts of the firing charges which had been overturned:

> "The Notice of Proposed Removal contained three Charges as follows: Inefficiency, with five specifications, Resisting Competent Authority, with six specifications, and Making False and Misleading Statements, with two specifications. Admiral Capone dropped two specifications under the Inefficiency charge, prior to making his final decision on removal, thus leaving three specifications. The FEAA ruled out one specification under Resisting Competent Authority, thus leaving five specifications. The FEAA ruled out all of Charge three, False and Misleading Statements, with its two specifications. Thus, there are two charges and a total of eight specifications still outstanding against appellant.
>
> "That the charges of Inefficiency and Resisting Competent Authority, and the eight specifications which remain outstanding against appellant were essentially the same charges and specifications used in giving the "unsatisfactory" performance rating and withholding of appellant's within-grade salary increase earlier in 1977 prior to the 'removal' action."

NOTE 16: The Ninth Circuit has applied *Mt. Healthy* to reach a conflict with the opinion of the lower courts in the case *sub judice*. *Maybey v Reagan*, 537 F.2d 1036, 1044 (1976). In *Maybey*, the appellate court held that any discipline designed even partially to punish the protected exercise of a constitutional right is unlawful. The Ninth Circuit ruled further, that a contrary holding would chill the exercise of constitutional rights by public employees and would allow *a facially legitimate*

The cosmetic surgery needed to effect "a facially legitimate ground for termination" is seen in the record of the present case. For example, on March 21, 1977, the charges were initially issued to deny petitioner's within-grade salary increase. *FEAA Exhibit 64*. Those charges were labelled at that time as "*Inability To Understand Requirements of a Task*". Approximately two months later, and coinciding with petitioner's visit to the National Security Council, these same charges were re-labelled "Inefficiency" and re-issued as justification for the ultimate discipline,—job termination. *Notice of Proposed Removal*, May 19, 1977.

A similar cosmetic alteration is seen in the record where the agency had initially issued the charges in a second group labelled, "*Not Accepting/Assuming Responsibility Commensurate With Grade and Assignment.*" These charges were then duplicated word-for-word in the Notice of Proposed Removal and re-labelled, "*Resisting Competent Authority*". The third (and last) group was overturned as a Constitutional violation. First Amendment (free-speech).

There was a major impropriety associated with the agency's cosmetic surgery, however, which the district court erroneously failed to consider in ruling for the

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ground for termination to mask unconstitutional motives. That is exactly the circumstances of the present case. Further, Civil Service Commission policy and case precedent have long distinguished between "level-of-competence" charges to deny an employee's within-grade salary increase, and misconduct or performance charges to effect job terminations. At Section S4-1d(6) of the contemporaneous Federal Personnel Manual Supplement 752-1, a mandatory requirement is established for a firing action:

> "When an agency's reasons are based on an employee's past actions, the advance notice must label the actions the way they were treated when they originally occurred."

And in the Commission's own case-precedent: "As long as the bases of the adverse action and the withholding action are kept separate, no procedural error occurs". Board of Appeals and Review, *BAR 531-73-97*, February 16, 1973.

government on summary judgment. That impropriety was the fait accompli presumption at the outset of the rehearing that the cosmetically re-labelled charges "constitute good cause for removal", and the attendant refusal of the presiding official to reconsider the validity of those charges, or to accept any evidence thereupon. MSPB *Initial Decision On Reconsideration*, Appendix E, page 32a.

Such restraint had been explicitly recognized with disfavor by the MSPB Chairwoman who had ordered the FEAA ruling on the residue charges to be VACATED because the engineer had been "unduly restricted" in his presentation. *MSPB Opinion And Order*, Oct. 17, 1980, Appendix D, page 29a. There is no dispute between the parties that the residue charges had been used against petitioner THREE TIMES, that is, in THREE DIFFERENT AND SUCCESSIVE PERSONNEL ACTIONS. Only the charge of expressing his professional opinion about the vulnerability of the President's crisis computer network was a new charge, and that charge had been declared UNCONSTITUTIONAL. Ergo, there were no charges remaining which justified the ultimate discipline of firing in accord with *Mt. Healthy*. Petitioner submits that by whatever name, "res judicata" or "double jeopardy," the effect in the present case must be translated as prima facie evidence of reprisal.[17] The agency

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NOTE 17: The evidence of reprisal is now seen to weigh heavily in favor of reversal of the agency's firing action:

1. The agency used old charges. (Undisputed)

2. The agency used a Constitutionally-impermissible charge. (Undisputed)

3. The agency failed to sustain 5 charges of the original thirteen. (Undisputed)

4. The agency was in violation of the grievance law (5 C.F.R. 771) and its own regulation throughout the period of the firing charges. (Undisputed, but attributed blame for the violation to the Grievance Examiner.)

5. The agency invoked the law under 5 U.S.C. 4301 et seq. and then violated the due process provisions of that law. Fifth Amendment. (Disputed by agency, claiming no legal requirement to comply with the law.)

ruling of May 23, 1977 (FEAA Exh. 65) had found petitioner guilty (for denial of a salary increase) on the same charges which it found petitioner guilty one month later on June 24, 1977 for the ultimate discipline of job termination.

The Pickering Balance Vs. The Mt. Healthy Test.

Petitioner urges this Court to consider the national security implications in the present case, and to apply its "balancing test" from *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968):

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Translated into the circumstances of the present case, the problem is seen to be: to arrive at a balance between (a) the interests of the agency as an employer in promoting the efficiency of the public service it performs, and (b) the interests of the engineer as a citizen as well as a Department of Defense employee in expressing a professional opinion about a technological deficiency in a defense computer network to which he was officially assigned[18] (MSPB Exh. 68), and for which he was especially qualified.

NOTE 18: Petitioner's official Position Description (MSPB Hearing, Exhibit A-68) explicitly required him to keep "the supervisor advised of . . . *controversial matters.*" The high failure rate (50%) of the President's crisis computer network was certainly a controversial matter within the agency. But having advised his supervisor as a member of the Federal work force, petitioner was thereupon required to "put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department." The Code of Ethics for Government Service enacted by the Congress, mandated that petitioner's loyalty rise above loyalty to his supervisors or the agency, particularly where the national defense was involved, as in the case at bar. On this point alone, the loyalty of the teacher to the school board in the case of *Mt. Healthy* must be distinguished from, and subordinated to the loyalty of petitioner in the present case.

The indisputable record shows that the factual circumstances of national jeopardy in the present case are so strongly distinguished from those of *Mt. Healthy* as to suggest that those circumstances were inapplicable to the latter precedent. *Mt. Healthy* was concerned with a teacher's complaint about the school "dress code" within the provincial boundaries of a Board of Education school district. Angry, the teacher had taken his complaint to the general public. It is important to note that the engineer herein did not go public with his technological concerns at any time during his employment within the Department of Defense. Further, he sought the support of higher management within the agency before being rebuffed there. The engineer submits that the facts of this case demand that *Pickering* rise above *Mt. Healthy* as the controlling case precedent because of the crucial nature of the public interest involved. A balance, in the national interest, must be addressed by this Court. Independent authority provided to the evidentiary record by the engineer has clearly established that the public interest in the present case, involving as it does, the vulnerability of the President's crisis computer network was so strong that it outdistances the "dress code" in *Mt. Healthy* by a substantial margin.

In these special circumstances, petitioner submits that a reasonable balancing test, such as the Supreme Court defined in *Pickering*, is more appropriate to the present case, than the conjectural possibilities of an adverse ruling set forth in the two-step adjudication of the *Mt. Healthy* precedent. The D.C. appellate court has confronted this mixture of First Amendment rights and the "efficiency of the Service" firing in *Tygrett v. Barry*, 627 F.2d 1279 (1980). At 1282, the Court noted that,—

> *Pickering* and its progeny continue to be the meter by which the First Amendment rights of public employees are measured. Whenever a public employee has been discharged for the exercise of his First Amendment rights, "the initial issue . . . is whether there was, in fact, an interference with the efficiency of the public

> services performed ..." *Jannetta v. Cole*, 493 F.2d 1334, 1336 (4th Cir. 1974). Where no such interference is shown, the discharge cannot be sustained.

If this Court looks favorably to the application of the *Pickering* balance in this case, its ruling must be applied to reverse the firing of a computer systems engineer who sought to warn higher management authority about the unreliability of the defense computer network, rather than a ruling in support of the reprisal concerns demonstrated by the respondent agency.

During the first hearing before the Federal Employee Appeals Authority, the presiding official restricted petitioner's presentation to exclude the issue of whether the engineer had been right or wrong on the public interest issue, i.e., the vulnerability of the President's crisis computer network. MSPB Tr. 7, Vol. 1. Restraint on this same issue was again made during the second hearing. The decisions of this Court in *Pickering* are seen to conflict with the Fourth Cir. in the present case:

> The relevant factors include whether the speech is defamatory or false and whether the speech relates to a matter of public interest." *Pickering*, at 569-573.

In *Rolles v. Civ. Serv. Commission*, 512 F.2d 1319, 1325 (1975), the D.C. appellate court was also in conflict with the Fourth Circuit courts below. The *Rolles* court held that where a person's good name, reputation, honor, OR integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. THE HEARING IS TO PROVIDE THE PERSON AN OPPORTUNITY TO CLEAR HIS NAME. (Emphasis added.)

Despite this conflicting ruling between the D.C. circuit and the Fourth Circuit, supra, the lower courts in the case at bar have steadfastly refused petitioner's attempt to clear his name of the falsity of the third firing charge. It was proven below that the firing charge itself was issued

erroneously by the Department of Defense agency in violation of petitioner's First Amendment rights (free speech).

The Fourth Circuit ruling in the present case, regarding the right of petitioner to prove whether his Constitutionally protected free speech was true or false, is also in direct conflict with the Fifth Circuit ruling in *Porter v. Califano*, 592 F.2d 770 (1979). In *Porter*, the Fifth Circuit found that there was "a genuine issue" as to whether the subject of plaintiff's free-speech allegations were true or false. The Fourth Circuit lower courts in the present case are also in conflict with the Supreme Court on the same issue; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Nonetheless, the MSPB administrative law judge ruled on the first day of the reopened hearing to again restrict petitioner, acting pro se, in his defense presentation:

> I have already decided that it's irrelevant in this proceeding, at least whether the network is or is not reliable. So this means we will not hear evidence that is offered, if it is offered, to prove that the network or system was either reliable or that it was defective. When I refer to the network or the system, there is a long descriptive title to that. It's called the Prototype World Wide Military Command and Control Intercomputer Network. (*MSPB Vol.I*, Tr. 7, lines 2-10.)

This reason for granting the writ has been shown to involve an important federal question intimately involved with the national security, and the welfare of more than 200,000,000 U.S. citizens. The agency's motives for firing petitioner have been directly questioned by the MSPB Chairwoman, stating conclusively that "the charges, on their face, show a 'MIXED MOTIVATION' for appellant's removal. . . ." *Knotts v. U.S.*, 121 F. Supp. 630 (1954) addresses the issue of permissible *motives* in even broader terms:

> Where a federal government employee is discharged, not for the good of the service but from MOTIVES of malice OR FOR ANY REASON OTHER THAN THE GOOD OF THE SERVICE, the discharge is unlawful.

During the hearing reopened by order of the MSPB Chairwoman, the presiding official clearly identified a "reason other than the good of the service,"—a constitutionally-impermissible reason. Petitioner asserts that, under the guidance and tutelage of the agency's expert legal staff, the unsuccessful attempt to use a constitutionally-impermissible charge must reflect an impermissible motive, and therefore, according to the *Knotts* rule, the discharge is unlawful.

If it is decided that the "*Pickering* balance" does not adequately protect petitioner in the present circumstances of a potential national security threat to the United States, the Court is urged to set case precedent which WILL shift the Pickering balance to weigh in favor of technologists whose knowledgeable warnings may affect our survival in the future.[19]

In conclusion, the tone of the ruling set by the district court below (and the Fourth Circuit one-paragraph ruling in affirmation) is seen to be in strong conflict with the appellate court of the District of Columbia in an environment substantially less foreboding:

> The nation's welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest. (*Expeditions Unlimited, Etc. v. Smithsonian Inst.*, 566 F.2d 289, 1977.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the federal

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NOTE 19: The Court may want to consider the relative impotence of a petitioner engineer who, without financial resources of employment, must defend himself/herself, pro se, against the skills and experience of a full legal staff arrayed against him by a Federal agency. In that array, would *Pickering* or *Mt. Healthy* provide the national safeguards intended by this Court?

district court, affirmed by the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

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October 5, 1984

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 83-1394

JOHN H. BRADLEY,

Appellant,

v.

SECRETARY OF DEFENSE;
MERIT SYSTEMS PROTECTION BOARD;
LUCIEN CAPONE, JR.;
MARSDEN E. CHAMPAIGN AND
IRVING BIALICK,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A No. 82-0973)

Submitted: March 15, 1984. Decided: July 11, 1984.

Before RUSSELL, PHILLIPS and SPROUSE, Circuit Judges.

(John H. Bradley, Appellant Pro Se. Thomas L. Blackburn, Special Assistant, for the Appellees.)

PER CURIAM:

A review of the record and the district court's opinion discloses that this appeal from the Court's order affirming the decision of the Merit Systems Protection Board is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. *Bradley v. Secretary of Defense*, C/A No. 82-0973 (E.D.Va., February 15, 1983).

AFFIRMED.

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-973-A

JOHN H. BRADLEY,

Plaintiff,

vs.

SECRETARY OF DEFENSE,

Defendant.

MEMORANDUM OPINION

Filed In The
United States District Court
Alexandria, Virginia
Clerk
February 15, 1983

Before the court on cross-motions for summary judgment, this action is an appeal of a March 8, 1982 decision of the Merit Systems Protection Board (MSPB) which upheld the action of the Defense Communication Agency of July 1, 1977, terminating the plaintiff's employment with that agency.

This is the most recent in a series of actions[1] instituted by the plaintiff to vindicate himself and to seek redress for the termination of his employment with the Defense Communication Agency allegedly in retaliation for certain communications he made to his superiors, to a Congressman and to the National Security Council. While the

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[1] The plaintiff has brought four previous actions alleging generally the same matters raised in this case. On or about November 10, 1976,

Footnote 1 (cont.)
plaintiff filed suit in the Eastern District of Virginia against Computer Sciences Corporation, Irving Bialick and Marsden Champaign, among others, in Docket No. 76-836-A. That suit alleged, *inter alia*, that Bialick and Champaign had tortiously republished a libelous letter concerning plaintiff's professional conduct, and had issued him an Official Reprimand, causing mental anguish and interference with his employment relationships. On November 25, 1977, the court dismissed the action, on plaintiff's motion, without prejudice on the condition that plaintiff be responsible for defendants' attorney's fees if he brought substantially the same action in the future.

On or about September 3, 1977, plaintiff filed suit in the District Court for the District of Columbia against Lucien Capone and Lee M. Paschall, in both their individual capacities and their official capacities, in Docket No. 77-1731. That suit alleged that Capone's denial of requested relief in a grievance proceeding arising out of the above-mentioned Official Reprimand was arbitrary and capricious; and that Capone, Champaign, and Bialick had taken reprisal action against the plaintiff, including the issuance of a Final Notice of Removal from federal employment. The plaintiff requested declaratory and injunctive relief, reinstatement, back pay, compensatory damages, and punitive damages. Pursuant to defendants' motion, the matter was transferred to the Eastern District of Virginia, Docket No. 77-935-A. On March 10, 1978, the court dismissed the defendants in their individual capacities. On April 20, 1978, the court dismissed the action against the defendants in their official capacities for lack of subject matter jurisdiction.

On or about March 1, 1978, plaintiff filed an action in the Eastern District of Virginia against Computer Sciences Corporation, Irving Bialick, Marsden Champaign, the Secretary of Defense, et al., in Docket No. 78-131-A, alleging tortious interference with employment relationships, intentional infliction of mental distress, libel, republication of libel, wrongful issuance of an Official Reprimand, and conspiracy, and seeking compensatory and punitive damages. On September 27, 1978, the court dismissed the action as to the Secretary of Defense; and on October 31, 1978, the court granted the remaining defendants' motion for a directed verdict and dismissed the case. Plaintiff's appeal of the directed verdict was unsuccessful. *Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir. 1981), *cert. denied*, 454 U.S. 940 (1981).

On or about October 27, 1978, plaintiff filed an action against the United States in the United States Court of Claims, in Docket No. 472-78. Plaintiff alleged that Champaign and Bialick had denied the plaintiff job rights in reprisal for his having been a "whistle blower," and that he was deprived of his rights without due process of law, and that Bialick had made false and misleading statements. Plaintiff also

complaint alleges numerous causes of action, the plaintiff on December 17, 1982, agreed that his only viable claim was an appeal, pursuant to the Administrative Procedures Act, 5 U.S.C. § 701, et seq., from the March 8, 1982, decision of the MSPB.[2]

The plaintiff, employed by the Department of Defense (DOD) since 1967, was transferred to the Defense Communication Agency within the DOD in May, 1972. Plaintiff's troubles stem from his work on the World Wide Military Command And Control System (WWMCCS).[3] Although some of the allegations in the complaint refer to events as early as 1973 when the plaintiff apparently began criticizing the reliability of the system, the immediate activities which, according to the plaintiff, precipitated his termination began on February 25, 1977 when the plaintiff wrote a "disposition form" ("DF") to Dr. Bialick, his immediate supervisor, and sent copies to three higher ranking officials in the WWMCCS project. In the form, Bradley claimed that hs had been excluded from warm-ups and from other preparations for an exercise involving the Prototype WWMCCS Intercomputer Network (PWIN) (Petition to

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Footnote 1 (cont.)
alleged intentional infliction of emotional distress, improper denial of within-grade increases, improper termination, improper denial of benefits under the Federal Employees Compensation Act, and improper denial of reimbursement of medical costs. Plaintiff sought back pay, pay for wrongfully denied in-grade increases, and medical costs. On June 1, 1979, on defendant's motion for summary judgment, the court granted judgment for the defendant on all counts.

[2] *See* Order of December 17, 1982.

[3] The WWMCCS, often referred to by the plaintiff as the President's crisis computer network (plaintiff's first amended complaint at 4), was established in 1962 "to provide the National Command Authorities, i.e., the President and the Secretary of Defense, with information on world situations which is essential for accurate and timely decisions." H.A.S.C. Rep. No. 94-72, 94th Cong., 2nd Sess. 4 (Feb. 18, 1977) (MSPB ex. 59). The system was reorganized by the DOD in 1971 to correct perceived deficiencies. *Id.* at 5.

Reopen Hearing, ex. 13 at 14). On March 12, 1977, plaintiff wrote a letter to Lt. Gen. Paschall, Director of the Defense Communications Agency, claiming that data and definitions from which certain of the PWIN reliability data was derived were "inaccurate and misleading" (Petition to Reopen Hearing, ex. 9).

On March 21, 1977, he was denied a salary increase. Sometime in April, 1977, he wrote a letter to Congressman Newton I. Steers discussing his formal grievances then before the Defense Communications Agency and the reliability of PWIN.[4] On April 21, 1977 he met with Robert A. Rosenberg of the National Security Council and again discussed PWIN's reliability.[5]

On May 4, 1977 Bradley received an unsatisfactory performance rating (FEAA ex. 63). On May 19, 1977 he received a Notice of Proposed Removal (Petition to Reopen Hearing, ex. 13), charging the plaintiff with inefficiency in performing his assigned duties, resisting competent authority and making false and misleading statments in his February 25 DF to Dr. Bialick and in his March 12 letter to Lt. Gen. Paschall. On July 1, 1977, after a review of the plaintiff's response to the Notice, the agency sustained the specifications, with the exception of two specifications in support of the inefficiency charge, and terminated the plaintiff.

The July 1, 1977 termination was appealed to the Federal Employee Appeals Authority (FEAA) of the Civil Service Commission which, on August 9, 1978, after a hearing and

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[4] Although the letter to Rep. Steers is not in the record, its subject matter can be gleaned from Lt. Gen. Paschall's April 20, 1977 letter in response to a letter dated April 12, 1977 letter in response to a letter dated April 12, 1977 from Rep. Steers concerning Bradley's statements (MSPB ex. 19).

[5] Bradley's April 29, 1977 letter to Rosenberg was in part a memorialization of their conversation (Petition to Reopen Hearing, ex. 11).

after reviewing the evidence—including the plaintiff's attack on the credibility of the agency witnesses, Bialick and Champaign, and the agency's attack on his own credibility—upheld the termination on the grounds of the following three specifications of inefficiency:

1. That the plaintiff "received a valid assignment to establish standards for PWIN documentation, that he did not complete the assignment and that he has given no reason for his failure to complete it" (FEAA decision, p. 7).

2. That the plaintiff, after being directed by his Branch Chief not to include irrelevant details in CCB (Configuration Control Board) minutes and not to include references to personal disagreements in technical or administrative documents, violated these directives; and that the plaintiff omitted from the CCB minutes details of and incorrectly described events occurring at the meetings.

3. That the plaintiff failed to establish and implement necessary Configuration and Control Procedures (*id.* at 9-12).

The effects of those inefficiences were described as follows:

> (5) The above instances of your inefficiency have resulted in a loss of management control, and time and effort by various members of the Network Branch during a critical evaluation period. In addition, there is a distinct possibility of future additional costs to the government for accomplishing the tasks that were properly within the scope of your responsibilities and assigned duties. Your overall performance has been of a level substantially below that required of a senior technical employee at the GS-14 level. You have not accepted the responsibility nor exercised the initiative necessary to perceive and identify problems, and to propose meaningful solutions commensurate with your grade level and years of experience.
>
> (6) Contrary to the requirements stated in your Position Description you have required much detailed

> supervision and specific direction and explainations (sic) when given assignments. You have also demanded that assignments and directions be spelled-out for you, in writing, before you would comply.

Of the six specifications of resisting competent authority, five were found, on conflicting evidence, to be sustained (*id.* at 13-23):

1. That the plaintiff was instructed to but refused to complete his individual development plan (IDP) (*id.* at 13-16).

2. That the plaintiff was directed to write a report on "The PWIN Operational Experiment" but, in a meeting with Network Control Chief Paul Magtutu and Dr. Bialick, refused to write the report (*id.* at 16-17).

3. That Dr. Bialick asked the plaintiff why he had been searching through the Branch secretary's folder where she kept incoming correspondence for the Branch Chief. The plaintiff answered that he was looking for a DF he had written to Dr. Bialick, that he knew Mr. Philip Kent handled the mail while the Branch Chief was absent and that he did not want Mr. Kent to see the DP. Dr. Bialick told plaintiff that, as the acting Branch Chief, Mr. Kent was responsible for handling the Branch mail. After some discussion concerning plaintiff's previous notice of this procedure, Dr. Bialick told the plaintiff that personal mail should be sent to the Branch Chief in a sealed envelope, but that nonpersonal Branch activity correspondence would be open to review in the normal chain of authority. The plaintiff then stated that henceforth he would put all matters to the Branch Chief in a sealed envelope. After Dr. Bialick stated that this would be contrary to the instructions just given, the plaintiff asked Dr. Bialick about the consequences of sealing all mail to the Branch Chief (*id.* at 17-18).

4. That the plaintiff, Dr. Bialick and LTC Magtutu met and agreed on the priority the plaintiff should give to his

then-existing assignments. Following this meeting, after LTC Magtutu had described to him the assistance he required in the "consolidation effort" involving the PWIN security procedures, the plaintiff called Dr. Bialick and accused LTC Magtutu of unfairly criticizing plaintiff and stated that he was being "set up." At the subsequent meeting with Dr. Bialick and the plaintiff, LTC Magtutu reviewed his instructions to the plaintiff and the plaintiff denied having been so instructed. When LTC Magtutu made several attempts to restate the plaintiff's duties, the plaintiff again denied having received them earlier and introduced other grievances into the meeting. Dr. Bialick then dictated to the plaintiff his assignments, and found that plaintiff in receiving the dictation had changed what he had been dictated. The plaintiff then refused to give LTC Magtutu a copy of the plaintiff's notes unless LTC Magtutu would rule him insubordinate if he would not comply (*id.* at 19-21).

5. That the plaintiff in a DF to Dr. Bialick stated that Mr. Philip C. Kent had "directed" the MITRE Corporation to withhold support from the plaintiff. After Mr. Kent's support omission was cleared up as an oversight. Dr. Bialick approved a one month delay in MITRE's support. The plaintiff later referred to the delay in a DF and in a Contract Deliverable Evaluation. It was charged that the references showed the plaintiff's unwillingness to accept his supervisor's decision and were inappropriate uses of these forms ((*id.* at 21-23).

The false and misleading statements charge was not sustained because of the FEAA's findings that the February 25 DF and the March 12 letter constituted protected speech and were not written with actual malice, and that the plaintiff had reasonable grounds for the assertions in his correspondence, whether they were true or not. The FEAA found also that the March 12 letter had not been communicated to anyone other than Lt. Gen. Paschall.

The FEAA rejected the plaintiff's contention that the agency had violated its regulation which required the agency to assist an employee in attaining a statisfactory performance prior to initiating a removal for insufficiency. It found the regulation inapplicable where the removal was for resisting competent authority *and* inefficiency. Moreover it found that the plaintiff's superiors did not, as the regulation suggests, document their efforts.

The FEAA also rejected the plaintiff's contention that the agency had violated its own regulation requiring a 90 day period for an employee to improve prior to issuing an unsatisfactory performance rating. The FEAA found the regulation inapplicable to a removal action.

The FEAA found, contrary to the plaintiff's assertion, that there was no evidence that his termination was in reprisal for using Gen. Paschall's Open Door policy, for filing a grievance or for his stated concern for the reliability of the PWIN report. Insofar as the first and last of these are concerned, the FEAA found that plaintiff was terminated not for reprisal but because the agency believed the statements contained in the letters were false and misleading.

The FEAA also rejected the plaintiff's claim that he was suffering from a mental disability at the time of his removal and that the agency failed to file a disability retirement application on his behalf. The FEAA found that the plaintiff had been consulted with regard to a disability retirement; that the plaintiff decided not to apply for such retirement; and that thereafter a properly convened panel decided, on June 24, 1977, for sufficient reasons which were not arbitrary or capricious, that the plaintiff's condition did not warrant a fitness-for-duty examination. It further found that the evidence did not reveal that the plaintiff's condition was such that he was mentally unable to decide whether he should apply for disability retirement. Accordingly there was no requirement that the agency file for disability retirement on behalf of the plaintiff.

The plaintiff applied to the MSPB (the successor to the FEAA) to reopen his case. Finding that the application was untimely, the MSPB nevertheless reopened the case on its own motion. It concluded that under *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the charges, on their face, showed a "mixed motivation" for plaintiff's removal because the third charge of false and misleading statements involved constitutionally protected conduct. Accordingly the case was remanded to the MSPB Field Office to allow the record to be developed and analyzed in light of *Mt. Healthy*. The MSPB further found support for plaintiff's contention that he was unduly restricted at the hearing in the development of his reprisal claim. This issue was also to be considered on remand. The decision of the FEAA was vacated.

On remand the administrative law judge of the MSPB Field Office (ALJ) conducted a further hearing. In its March 8, 1982 decision it noted that the plaintiff at the hearing was given a "great deal of latitude in presenting his evidence of reprisal." The decision also correctly noted that the MSPB order of remand did not disturb the original decision finding that the charges of inefficiency and resisting competent authority were supported by the evidence.

The protected activity which the ALJ considered on remand consisted of not only the letters to Bialick and Paschall (considered at the original hearing), but also the communications with Congressman Steers and his staff and with Rosenberg of the National Security Council. The latter communications apparently were not considered in the original FEAA decision. The ALJ on remand concluded that each of the communications constituted protected First Amendment activity.

The Field Office ALJ found that the agency official who issued the decision to discharge plaintiff was Rear Admiral Capone; that Capone did have knowledge of the communication to Congressman Steers and of the two letters, but had

no knowledge of the communication to the National Security Council. The ALJ further found a causal connection between the protected activity, other than the NSC communication, and plaintiff's removal. On this basis, the ALJ allocated to the agency the burden to prove by a preponderance of the evidence that it would have removed the plaintiff even in the absence of the protected activity.

The ALJ, after a careful weighing of the evidence, found that the plaintiff's protected activities were not the real reason for the termination, but that the agency would have removed plaintiff despite his engagement in those activities. He found that the intent to remove the plaintiff preceded his protected activities; that the plaintiff's lack of productivity was documented over a period of one year prior to the removal; and that repeated attempts to help the plaintiff improve his performance were unavailing. The ALJ rejected the plaintiff's claims of reprisal. The ALJ accordingly concluded that the agency's action in removing the plaintiff was proper. It is from this March 8, 1982 decision that the plaintiff appeals.

The court has read the transcripts of the hearing before the ALJ on remand, and considered the other parts of the record designated by the plaintiff, including portions of the testimony and certain exhibits introduced before the FEAA.

The appropriate standard of review in this court is whether the decision of the MSPB is supported by substanital evidence on the record and is not arbitrary, unreasonable or capricious. *Halsey* v. *Nitze*, 390 F.2d 142 (4th Cir. 1968).

It is important to note just what issues are before the court for review. When the MSPB determined that the application for reopening the case was inexcusably out of time (a determination which the plaintiff does not here question), but reopened the case on its own motion, the issues to be considered on remand were specific, namely, (1) would the agency have terminated the plaintiff without

regard to his protected activity, and (2) a reconsideration of plaintiff's reprisal claims. The plaintiff seeks to add to those issues in this appeal the propriety of not giving him 90 days to improve his performance; the duplication of the charges in his notice of proposed termination and other adverse actions; and the failure to give the plaintiff medical assistance and other activities indicative of malice on the part of the agency. These were not before the MSPB on remand, and will not be considered here on appeal, although of necessity, in considering the reprisal issue and the separation of the protected activity from the other assertions of inefficiency and resistance to authority, the basis for the latter assertions had to be and were explored.

The plaintiff's assignments of error include a claim that he was unduly restricted in the presentation of his case before the FEAA and the hearing before the MSPB which resulted in the March 8, 1982 decision.The restriction before the FEAA is not before the court. That restriction, in part, occasioned the *sua sponte* reopening of the FEAA hearing and remand. Any claim of restriction at the recent MSPB hearing is belied by a reading of the transcripts. The hearings lasted seven days. The ALJ displayed exemplary patience in dealing with this *pro se* plaintiff who, albeit polite and deferential throughout (characteristics which also have been exhibited by the plaintiff in this court), persisted in arguing with the witnesses and going into areas the ALJ—properly—had ruled were not part of the hearing on remand. While much of the transcript is devoted to colloquies between the plaintiff and the ALJ with regard to the admissibility and introduction of exhibits and advice from the ALJ as to the proper way to proceed, the ALJ's statement in his decision that the plaintiff was given a great deal of leeway in presenting his reprisal claim can only be characterized as an understatement.

The evidence in this record reveals that the plaintiff is a very competent engineer, possessed of an exceptional expertise in the field involved in the project on which he

was working. However, he developed a single-mindedness approaching obsession[6] in his criticism that the system which was the subject of the project on which he was working was not sufficiently reliable. Much of his presentation before the administrative bodies was concerned with whether and when the system was to become operational, and it was calculated to show that the system's reliability was or should have been of primary and not secondary importance and that the plaintiff's criticism was justified—and perhaps it was. It was not his criticism as such, however, that led to his termination, but his single-mindedness in voicing and communicating his criticism which caused him not to do his job and to resist his superiors who were trying to get him to do it.

That same single-mindedness has caused him to view as evidence of reprisal, malice, deception or conspiracy, or all of these, every assignment or responsibility or lack of assignment or responsibility given him, every failure to follow his suggestions, failure to give him needed assistance, failure to provide for him an IDP (independent development plan), failure to receive copies of documents, concern over his mental condition, lack of concern over his mental condition, delay in processing his grievance, denial of travel funds, failure to support his teaching venture at George Washington University, attempts at providing the plaintiff with training, the disappearance of certain records and ultimately, of course, his termination.[7] For each of these actions an explanation was given which the ALJ, as was his

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[6] The plaintiff, in July, 1978, was given a disability retirement because of mental disability, retroactive to the date of his termination, July 1, 1977. He states in his May 31, 1977 Blue Cross Supplemental Benefits Claim sheet that he is suffering from "extreme depression, anxiety, apprehension, and insecurity resulting from job-related stresses" (FEAA ex. 5c).

[7] Indeed, the plaintiff's view of matters carried over to the hearings, where he characterized every contradiction in the evidence or documents as falsifications and deception.

perogative, found reasonable and sufficient to negate the sinister purpose and ulterior motive ascribed to each by the plaintiff. For example, the delay in processing the grievance, although particularly egregious, was explained as occurring because of the absence of a qualified hearing officer.[8]

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[8] The situation with regard to the plaintiff is prehaps best presented in the following admittedly isolated excerpts from the testimony before the MSPB:

Q. (Bradley) Relevant to that statement and that promise of 90 days to you, what momentous event occurred that required you to abort that procedure at the 15th date instead of the 90th and move immediately into removal action?

A. (Bialick) To the best of my ability, John, the momentous occasion was a whole year of total unproductivity on your part, refusal to cooperate on your part. Every time we did anything, you gave us three more pieces of paper saying you won't do it. So the decision to remove you was based on a year of nonproductivity and refusal to do your job or, hopefully, inability to do your job."

MSPB hearing, Vol. I at 163.

* * *

JUDGE McCARTHY: Was there a particular time period when that began, when relationships became strained?

THE WITNESS (Bialick): John's grievance, I think was the thing that—I mean, where CSC sent a letter, as he pointed out. CSC sent a letter saying in effect they objected to his forwarding their notes to a finished product. That was the subject that was brought up, and at this point I remember I asked John to respond to their allegations and explain what went on. John basically refused to respond to them and there ensued over a period of about two or three months when there were repeated incidents of the same thing where I would say, 'John, hey look, you can't do this, you can't give orders to that company except via the COR. Don't do this.' And they were again and again.

So, as a result, and I think—I'm having trouble with the date right now. I believe it was 1975, I sent this admonition, this letter of reprimand to John. From there on in, I believe almost every communication I had with John got to be the legal kind of thing.

Footnote 8 (cont.)

But as a whole, I felt John was a valuable employee. We needed him. We needed other activities. However, in the last year before he retired, before the action was taken, it was just no—nothing was produced. There was essentially a whole year of constant refusal to take orders, challenging everything that was done.

JUDGE McCARTHY: Did things become progressively worse?

THE WITNESS: No. I believe in the last year they became much worse.

JUDGE McCARTHY: The last year was worse than anything before?

THE WITNESS: I believe so, yes.

JUDGE McCARTHY: To what extent did you connect this behavior with his emotional condition? Did you feel it was related?

THE WITNESS: I felt that the severity of the reactions were related, how upset he became when we—when I would disagree with him, and I spent many, many hours of what I considered to be counselling, may I help type thing, to the point where I ran into trouble with some of my other employees. They said I was spending too much time with John and they demanded their fair share. So I believe that the symptoms were—the problems were such that they were related in terms of severity of his reaction.

JUDGE McCARTHY: Can you recall fairly the substance of the charges that led to his removal, generally?

THE WITNESS: Generally, yes.

JUDGE McCARTHY: Would you assign any priority of importance to the various reasons? Let's take them in three categories, the inefficiency, the resistance to authority, and the false or misleading statements.

THE WITNESS: To me, not getting the job done was the most important part.

JUDGE McCARTHY: Would that be keyed more to the first group, inefficiency?

THE WITNESS: Yes, we had, I believe, a pretty terrific team of people who had a very challenging project. A lot of very high, at least to us, placed people interested in what we were doing. Getting a job done, I think was pretty much what we all wanted to do.

JUDGE McCARTHY: How much weight did you attach to the—what would be next in order of priority or seriousness?

Footnote 8 (cont.)

THE WITNESS: The constant challenge to myself, in Col. Magtutu, to almost anybody that was in an authority position. I was again, and again, and again—anything we asked him to do got to be a point where he was seeing them as we were setting him up, and so there was a constant disruption to anything that involved his activity.

JUDGE McCARTHY: Going at least to this last year, and don't limit it to the last year, did you have discussions with others, particularly those above you, about his performance, his behavior and what to do about it?

THE WITNESS: Yes, sir.

JUDGE McCARTHY: Were there many?

THE WITNESS: I talked Mr. Champaign obviously (sic). I talked to Dr. Painter, who was the deputy of this C-400 organization you heard him refer to as the WWMCCS ADP director. Dr. Painter was the deputy there for quite some time. We discussed it with personnel especially.

JUDGE McCARTHY: How early?

THE WITNESS: Back at least at the time of the grievance process with the letter of reprimand. Personnel was with us.

JUDGE McCARTHY: Was that about the time when you dealt with the question of his possible illness?

THE WITNESS: That was one of the times. There were several other times after that, sir.

JUDGE McCARTHY: Was that as early as 1975?

THE WITNESS: I believe so. I believe that was the time when I saw his symptoms at their worse.

JUDGE McCARTHY: But the emphasis in my questions is discussions you may have had with others about what to do with what you saw as a problem.

THE WITNESS: I discussed that with personnel, discussed that with Dr. Painter, Mr. Champaign. There were a number of times when John ran into difficulties with other people in the branch, Col. Baumgartner as an example, a branch chief parallel to me. There was discussion with him on some of the problems he had with John. There were times when John ran into difficulties with contractor personnel other than CSC.

Footnote 8 (cont.)

JUDGE McCARTHY: Was it understood or specifically discussed whose responsibility it would be to initiate a personnel action of any kind to deal with the problem?

THE WITNESS: As first line supervisor, I believed that a number of things evolved on me. I had to initiate the actions as first line supervisor.

JUDGE McCARTHY: Did you in fact initiate the removal action and the other two actions?

THE WITNESS: I recommended the removal action. I think there was a distinction. I recommended it.

JUDGE McCARTHY: But to get the first steps going?

THE WITNESS: Yes, in that sense I did.

JUDGE McCARTHY: You did?

THE WITNESS: Yes.

JUDGE McCARTHY: You talked about the relative gravity of the performance charges and resistance to authority charges. Would you tell me how much weight was given to the falsification and misrepresentation charge or charges?

THE WITNESS: I believe a third in order of significance, because there were two events that occurred at the end, whereas all these other events had been continuing constantly.

JUDGE McCARTHY: How would you characterize that? Was that the last straw?

THE WITNESS: No, no, no. The decision—the complaints that we had from the other contractors, complaints we had from people who worked alongside of John, they were the most of the things. There was no last straw type of thing.

JUDGE McCARTHY: That's kind of an unfair question. If you said yes, I suppose, I would draw certain conclusions from it. But I understand.

THE WITNESS: John has a right to complain to anybody he wants to. That was never any problem, and I think I tried to point out the fact that I, for one, and other people agreed with him about technical problems that existed, and his complaints to us and to the outside world

Footnote 8 (cont.)

about the fact that there were problems with that, there's nothing wrong with that.

Id. at 127-133.

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Q. (Whealen) At the time you brought the removal action against the Appellant, were you under any pressure by your superiors to do so?

A. (Champaign) No.

Q. Would you have brought the removal action based on the now reduced number of charges in the specification?

A. I certainly would have.

Q. Why?

A. Because the charges in the removal action add up to a lack of performance, an absolute lack of performance, and I believe that an individual at GS-14 level should be producing something productive, and for the period of time covered by those charges, there had been no productive product from Mr. Bradley.

Q. Was the removal action in any way an act of reprisal by you and Dr. Bialick?

A. Absolutely not.

Id. at 139-140.

• • •

Q. (Bradley) When did Bradley first become a problem to you, sir?

A. (Champaign) Bradley—when Bradley became a problem was when Bradley began to let the fact that he had taken various actions against his supervisors cause him to stop doing his work, which was in 1976. Perhaps earlier than that your work slacked off, but 1976 it was noticeable that you were ceasing to do work and instead of accepting tasks, were objecting to every task being assigned that you were assigned, and it's my perception that that's because you were suspicious that having raised certain actions against your supervisor, that that supervisor would take reprisal action against you. I think you let that interfere with your duties.

Q. That was my suspicion or would you characterize it as—

A. That's my perception.

The absence of malice is thoroughly established. Bialick in particular, one of the main villains in plaintiff's scenario, comes across in the record as a person who recognized that the plaintiff was a good engineer and that he had good ideas. Bialick attempted to assist him—but to no avail (MSPB hearing, Vol. V at 119). The plaintiff's inferences that Bialick's actions were done in reprisal for Bradley's opposition to a coverup of the deficiencies of the Computer Sciences Corporation, in which Bialick had a thoroughly disclosed and very minor stock interest, are just not borne out in the record.

The court finds abundant support in the record for the MSPB/ALJ's finding that the real reason for the plaintiff's termination was his inefficiency and resistance to competent authority, and that the termination was untainted by his protected activity and was not in reprisal in any way for that protected activity. Indeed this record reveals overwhelmingly that, though the plaintiff was sincere and well meaning in his criticism, his superiors would have been derelict in their duty if, after all their attempts at corrective action and after plaintiff's continuing neglect and refusals to perform, they did not terminate this government employee for the good of the United States.

The March 8, 1982 decision of the ALJ, which became the

Footnote 8 (cont.)

Q. Would you use Dr. Bialick's term, "paranoia"?

A. I'm not a psychologist.

Q. You just feel I was overly suspicious?

A. Yes, I do.

Q. In your opinion, could you conceive of any reason why I might have been suspicious, legitimately?

A. There was no real basis for it. That's my assertion.

Id. at 143-144.

final decision of the MSPB, will be affirmed and summary judgment awarded the defendant.

United States District Judge

Alexandria, Virginia
February 15th, 1983

Footnote 8 (cont.)

* * *

JUDGE McCARTHY: There was some antagonism between Mr. Bradley and individuals in the branch other than yourself and Dr. Bialick?

THE WITNESS: (Champaign) Oh, very definitely, sir. The problem was that Mr. Bradley went to every meeting with a notebook quoting "who said what at any hour of the day and then went back and made great issue about that, and then a number of people got very much concerned about being drawn into some kind of dispute between Mr. Bradley and management, and they began to do what is probably a natural thing, an attempt to avoid it. But there was never any attempt on our part to condone that kind of behavior or to encourage it in any way. If I had known of it, I would have discouraged it. I did not learn it until afterwards."

Vol. IV at 144-145.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-973-A

JOHN H. BRADLEY,

Plaintiff,

vs.

SECRETARY OF DEFENSE,

Defendant.

ORDER

Filed In The
United States District Court
Alexandria, Virginia
Clerk
February 15, 1983

For the reasons set forth in the Memorandum Opinion this day filed, summary judgment is awarded in favor of the defendant Defense Communication Agency against the plaintiff John H. Bradley, and the March 8, 1982 decision of the Merit Systems Protection Board is affirmed.

United States District Judge

Alexandria, Virginia
February 15th, 1983

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MSPB Docket No. DCO75299084-ADD

JAMES J. ALLEN,

Plaintiff,

vs.

DEPARTMENT OF DEFENSE,

Defendant.

OPINION AND ORDER

This appeal involves the denial of a motion for an award of attorney fees under 5 U.S.C. 7701(g)(1) be the Washington, D.C. Field Office of the Merit Systems Protection Board where the appellant's removal for unacceptable performance was reversed based on a finding of harmful error. The appellant has petitioned for review of that denial.

In an initial decision dated September 28, 1979, the presiding official found that the agency, the Department of Defense, committed harmful error in failing to afford the appellant, James J. Allen, an opportunity to demonstrate acceptable performance prior to issuance of the notice of his proposed removal from the position of Attorney-Advisor, in accordance with 5 C.F.R. 432.101(a). Contrary to the Board's subsequent decision in *Wells v. Harris*, MSPB Docket No. HQ120500017 at 43 n. 13 (December 17, 1979), the presiding official found no error in the agency's effecting the removal pursuant to 5 U.S.C. 4303 before it established a performance appraisal system pursuant to 5 U.S.C. 4302.

By order dated November 1, 1979, the Board reopened

the appeal on its own motion, pending its decision in *Wells*. However, after receiving the appellant's motion to dismiss the reopening of the appeal, which was supported by the agency, the Board dismissed "the case without prejudice . . ." on January 11, 1980, indicating in the dismissal order that it was issued "with the understanding that the personnel action at issue is to be cancelled by the (agency)."

In an addendum decision dated May 9, 1980, the presiding official ruled on the appellant's motion for an award of attorney fees under 5 U.S.C. 7701(g)(1), disallowing his request for a separate hearing on the motion. The presiding official found that the appellant was the "prevailing party" in the appeal, having obtained the relief sought. However, he concluded that an award of fees was not "warranted in the interest of justice" because the harmful error on the part of the agency did not constitute a "gross procedural error," which would justify an award according to the legislative history of 5 U.S.C. 7701(g)(1).

In his petition for review of the addendum decision, the appellant set forth two main contentions: (1) that the presiding official erred in disallowing the appellant's request for a hearing on the motion in order to establish justification for an award based on the merits of the appeal; and (2) that the presiding official erred in concluding that an award of fees was not "warranted in the interest of justice." An *amicus curiae* brief further supporting these two contentions was submitted by the Government Accountability Project, a non-profit, non-partisan public interest organization.

With regard to the second contention of the appellant, we agree that an award of reasonable attorney fees under 5 U.S.C. 7701(g)(1) should be made in this case.

In opposing the petition for review, the agency has questioned whether the appellant can be considered the "prevailing party" in light of the Board's order of January

11, 1980, dismissing "the case. . . ." That order was not intended, however, to vacate the initial decision. In fact, the order specifically stated, "This determination does not address the merits of the initial decision rendered in this case." The initial decision was neither affirmed nor reversed thereby; it was simply allowed to become final by cancelling the reopening of the appeal. The presiding official correctly concluded, therefore, that the appellant was the "prevailing party."

The presiding official's error lies in his conclusion that an award of fees in this appeal is not "warranted in the interest of justice." Title 5, Part 432 of the Code of Federal Regulations, under which the appellant was removed (albeit improperly according to our subsequent decision in *Wells*), restates the requirement of 5 U.S.C. 4302(b)(6) that an employee be afforded "an opportunity to demonstrate acceptable performance" before he or she may be removed for unacceptable performance. 5 C.F.R. 432.101(a). The presiding official found in his initial decision that the agency had notified the appellant that he had 90 work days to improve his performance, but the agency then decided to remove him after 82 work days, during which time he was incapacitated by a back injury. In our view, the agency's failure to afford the appellant any reasonable opportunity to demonstrate acceptable performance "prolonged the proceeding" and "severely prejudiced" the appellant. *See Allen* v. *U.S. Postal Service*, MSPB Docket No. AT075299011 at 17 n. 36 (July 22, 1980). We find, therefore, that this procedural error is not only harmful, but also gross, warranting an award of fees "in the interest of justice." *Id.*

Our finding that an award of attorney fees is warranted in this case renders academic the appellant's second contention that the presiding official erred in denying the appellant's request for a hearing on his motion for an award of fees. Accordingly, we decline to reach that issue on review.

The amount of the award requested by the appellant in

his motion is unusually high for representation in an appeal before the Board: $41,453.90 in fees and $894.66 in disbursements. Since the statute authorizes the award of only such fees as are "reasonable," a determination of how much is reasonable in this case must be made, applying the factors set forth in *Kling v. Department of Justice*, MSPB Docket No. AT075299048 at 7-11 (July 22, 1980). *See also Copeland v. Marshall*, No. 77-1351, slip op. at 19-26 (D.C.Cir. September 2, 1980).

The number of issues raised and attorneys involved, coupled with the fact that some of the time expended by the appellant's attorneys related to processing a Freedom of Information Act request and a complaint with the Special Counsel which may or may not have furthered the appeal, indicates the complexity of the reasonableness determination in this case. We believe that the presiding official who is intimately familiar with the circumstances of the appeal is in the best position to make this reasonableness determination, expecially with regard to disallowances for duplication of effort, excessive billing rates of less experienced attorneys, and any unrelated or frivolous claims. *See Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 643 (6th Cir. 1979).

Accordingly, the petition for review of the addendum decision dated May 9, 1980, is hereby GRANTED, that decision is VACATED, and this case is REMANDED to the Washington, D.C. Field Office for an award of such attorney fees as are determined to be reasonable upon consideration of any further submissions that the appellant may make within ten (10) days and the agency may make within twenty (20) days after receipt of this opinion and order.

FOR THE BOARD:
Ruth T. Prokop

January 5, 1981
Washington, D.C.

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MSPB Docket No. DC752B80323

JOHN H. BRADLEY,

Plaintiff,

vs.

DEFENSE COMMUNICATIONS AGENCY

Defendant.

OPINION AND ORDER

Received
October 20, 1980

On August 9, 1978, the Washington, D.C. Field Office, Federal Employees Appeals Authority (now the Washington, D.C. Field Office of the Merit Systems Protection Board), issued an appellate decision which affirmed the action of the Defense Communications Agency in removing the above-named appellant from employment, effective July 1, 1977. The decision notified appellant of the regulatory provisions for requesting reopening and reconsideration thereof and stated that any request should be submitted within a reasonable time after receipt of the decision.

On November 29, 1979, appelant filed a petition requesting reopening and reconsideration of the Field Office decision, and was afforded an opportunity to provide reasons for the delay in submitting his petition. Having considered appellant's explanation, the Board finds that the reasons offered fail to demonstrate the exercise of due diligence or show sufficient explanation for the delay in

pursuing the reopening request. Although the request was based on the submission of alleged new and material evidence that was not available at the time the Field Office decision was issued, appellant has offered no explanation for the lapse of approximately five months between the time the evidence came to his personal attention and the date on which his petition was filed. Accordingly, the Board declines to accept appellant's request for reopening of the August 9, 1978 Field Office decision, because it was not timely filed.

Notwithstanding the foregoing, the Board has decided to reopen this case on its own motion pursuant to 5 C.F.R. 772.312 (1978). The record shows that appellant was removed on charges of inefficiency in performing his assigned duties, resisting competent authority, and making false and misleading statements. The third charge was based on two specifications: One involving a memorandum which appellant sent to his immediate supervisor, with copies to three other supervisors in the chain of command; the other involving a letter which appellant wrote to the Director of his agency. Both communications were critical of the agency's handling of reliability problems associated with its development of a defense computer network. The Field Office dismissed this charge and specifications, on the ground that the communications were constitutionally protected by the First Amendment, but did not articulate a rationale or cite any legal authorities to support its conclusion. The Field Office nevertheless affirmed the removal action on the ground that the evidence supported the remaining charges.

Since the issuance of the Field Office decision, the Supreme Court decided *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), which appears to support the Field Office conclusion that the communications cited in the third charge were constitutionally protected. The Court also noted that under its holding in *Mt.*

Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), the employer was entitled to defend the dismissal on the ground that it would have discharged the employee even in the absence of the protected conduct.

Since the charges, on their face, show a "mixed motivation" for appellant's removal, one of which involved constitutionally protected conduct, it is clear that the Field Office should have developed the record and analyzed the evidence in light of *Mt. Healthy*, and other relevant case law. Moreover, when viewed in light of appellant's proffered new evidence, the Board finds merit in the contention asserted in his reopening request that he was unduly restricted at the hearing in the development of the evidence supporting his claim of reprisal.

Accordingly, so that these significant issues may be considered, the Field Office decision is VACATED and the case is assigned to Administrative law Judge John J. McCarthy, for further hearing and a new adjudication.

For the Board:
Ruth T. Prokop
Chairwoman

October 17, 1980
Washington, D.C.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket No. 752B80323

JOHN H. BRADLEY,

Appellant,

vs.

DEFENSE COMMUNICATIONS AGENCY,

Respondent.

INITIAL DECISION ON RECONSIDERATION

By: JOHN J. MCCARTHY, Chief Administrative Law Judge

Dated: March 8, 1982

Appearances:

JOHN H. BRADLEY, *Appellant, pro se*
JOHN T. WHEALEN, General Cousel, Defense Communication Agency, *Counsel for respondent*

INTRODUCTION

This case involving the removal of an employee of the Defense Communications Agency is on remand by order of the Board directing that the record be reopened and that specified issues be considered. A hearing was held in March and April 1981 and briefs were thereafter filed by the parties.*

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* After the termination of his employment, the application which appellant filed for disability retirement was approved by the Office of Personnel Management (OPM). Thus, his retirement on account of disability, with annuity commencing the day following his removal, precludes reinstatement or recovery of back pay.

HISTORY OF THE CASE

Appellant, John H. Bradley, was removed from his position of Electonics Engineer, grade GS-14, on July 1, 1977, pursuant to a decision of the Defense Communications Agency (DCA) issued on May 19, 1977. The agency supported its decision with three charges: 1) inefficiency, 2) resisting competent authority, and 3) making false and misleading statements—further detailed in a letter of advance notice to appellant.

Appellant filed a timely appeal with the Civil Service Commission's Federal Employee Appeals Authority, Washington, D.C., Field Office,[1] on July 15, 1977. After hearing, an initial decision affirming the agency action was issued on August 9, 1978. The presiding official found that the agency proved charges (1) and (2) against appellant, and that these two charges justified the decision to remove him. The matters alleged under charge (3), however, were found to constitute "protected conduct" under the First Amendment and, therefore, not available as a basis for removing appellant.

In its remand order dated October 17, 1980, the Board stated that it appeared that charge (3) did involve protected conduct. The Board reopened the case because the charges on their face showed a "mixed motivation" for appellant's removal, one of which involved the constitutionally protected activities. The case, therefore, had to be evaluated in light of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and other relevant case law. In its order, the Board also noted that appellant had been unduly restricted at the hearing in his presentation of evidence of reprisal.

In the hearing on remand before the undersigned, the appellant, appearing pro se, was given a great deal of

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[1] Now the Washington, D.C., Regional Office of the Merit Systems Protection Board.

latitude in presenting his evidence of reprisal. It is important to note that the Board's Order does not disturb the Initial Decision's finding that charges (1) and (2) were supported by the evidence and that they constitute good cause for removal. The Board reopened this case only for a determination of how the decision to remove appellant was affected by the alleged reprisal for appellant's protected activities.

DISCUSSION AND FINDINGS

In determining whether an agency has retaliated against an employee for having engaged in protected activity, the Board has adopted the two-part test applied by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle, supra. See Gerlach* v. *Federal Trade Commission,* MSPB No. DC07528010020 (December 15, 1981). The employee bears the initial burden of demonstrating that the protected conduct was a motivating factor in the agency's decision to remove the employee. Even if the employee meets this burden, the agency's action will nevertheless be sustained if the agency shows by a preponderance of the evidence that it would have removed the employee even in the absence of the protected conduct.

I. Motivating Factor

The first part of the *Mt. Healthy* test was elaborated upon in *In the Matter of Robert J. Frazier, Jr.,* 1 MSPB 159 (1979), wherein the Board set forth the elements necessary to prove that an agency has acted wrongfully in reprisal against an employee for engaging in protected conduct. The employee must show initially 1) that he/she engaged in a protected activity; 2) that he/she was treated in an adverse fashion by the employer; 3) that the deciding official had actual or constructive knowledge of the activity in question; 4) that there was a causal connection between the privileged activity and the adverse action; and, 5) that the protected activity was a significant factor in taking the adverse action. *See Frazier, supra* at 186-88.

In the instant appeal, the appellant's protected activities fall into two categories, namely, (1) voicing criticism of his supervisor's actions to officials within the agency on two occasions and (2) whistleblowing outside the agency structure.

The two occasions on which appellant voiced his complaints within the agency formed the basis of charge (3) of the Notice of Proposed Removal of appellant, in which the agency charged appellant with having made "false and misleading statements." The first instance consisted of a memo written by appellant on February 25, 1977, to his immediate supervisor, Dr. Bialick, with copies sent to Mr. Champaign, Colonel Feeley, and Rear Admiral Capone, appellant's second, third, and fourth-level supervisors, respectively. In this memo, appellant complained that Dr. Bialick had excluded him from participation in a "PWIN" exercise before the Joint Chiefs of Staff scheduled to take place in March 1977.

The second instance used to support charge (3) was a letter written by appellant on March 12, 1977, to Lieutenant General Paschall, the Director of the agency. In this letter, appellant complained of the agency's delay in responding to his grievance and of his supervisors' taking reprisal actions, the effects of which, he wrote, went far beyond penalizing appellant and into the area of national security. Appellant also voiced his concern over the issue of reliability. The letter of March 12, 1977, also discussed appellant's claims that he was assigned the task of preparing reliability data forms without prior guidance or instruction; that certain data and other information on the forms were inaccurate and misleading and, therefore, falsely suggested a state of technical health for the PWIN; and that he had informed his supervisor of his opinion but was ignored.

In *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), the Supreme Court held that a public employee is protected by the First Amendment in commu-

nicating criticism privately to his employer. On the authority of *Givhan*, I find, as did the presiding official in the Initial Decision herein, that appellant's complaints or grievances submitted to his supervisors constituted speech protected by the First Amendment.

The second type of protected activity, "whistleblowing" to officials outside the agency, consisted of telephone conversations and meetings with Congressman Newton Steers and his staff, and separately with a member of the National Security Council (NSC). In these communications, appellant discussed his belief that the agency was mishandling the reliability requirement of the PWIN and was therefore not giving adequate attention to the importance of reliability.[2] Unable to convince his supervisors that they were not dealing properly with the reliability issue, appellant felt compelled to take his criticisms outside the agency, and he did so.[3]

The record shows that there was some disagreement between appellant and his supervisors over the issue of reliability of the PWIN. PWIN was a prototype of a computer network which the agency was trying to develop into an operational network. The agency, therefore, had two problems to address in the developmental phase: (1) whether it would work, and (2), if it would work, whether it would be reliable. (Vol. II, pp. 96-99).[4] Appellant's supervi-

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[2] It appears that in communicating with Congressman Steers, appellant also criticized the agency's failure to process his grievances.

[3] This case is governed by pre-Civil Service Reform Act (CSRA) rules and regulations because it was pending on the effective date of the CSRA. Sec. 902(b), Pub. L. No. 95-454, 92 Stat. 1224 (1978). Therefore, 5 U.S.C. § 2302(b)(8), which prohibits reprisals for whistleblowing, is not applicable to the instant appeal. Appellant's activities were in effect whistleblowing, though outside the protection of § 2302(b)(8); they are nonetheless privileged activities within the purview of the First Amendment. *See Mt. Healthy, supra; Pickering* v. *Board of Education*, 391 U.S. 568 (1968).

sors considered the first problem of primary importance since, if the network would not work, the reliability issue would be irrelevant. (Vol. II, pp. 96-99). Appellant, however, focused on the issue of reliability, believing it to be of primary importance. Whether appellant was right or wrong, it is fair to say that he had a reasonable belief that the agency was not handling the reliability issue properly. It therefore follows that appellant's communications to Congressman Steers and the NSC were protected "whistleblowing" activities under the First Amendment.

Subsequent to these protected communications, appellant was removed from his position as GS-14 Electronics Engineer on July 1, 1977. The charges leading to appellant's removal clearly indicate, on their face, that the agency took an adverse action against appellant subsequent to his protected activities. Appellant claims that he was treated adversely by the agency in other ways after his whistleblowing, e.g., the withholding of a within-grade pay increase on March 21, 1977, warning of an unsatisfactory performance rating issued May 4, 1977, and failure to obtain medical treatment in the spring of 1977.[5]

The agency official who issued the decision to discharge the appellant was Rear Admiral Lucien Capone, Jr. Admiral Capone evidently knew that the appellant had sent two

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[4] The symbol (Vol. ____, P. ____) will be used throughout this opinion to refer to the volumes and page numbers of the transcripts of the hearing on remand before the undersigned. In addition, references to exhibits will also be to those exhibits received at the hearing on remand.

[5] Although appellant claims that he was treated adversely by the agency on numerous other occasions, the majority of such claims refer to instances which occurred prior to the time appellant engaged in the protected activities discussed *supra*. It is evident, therefore, that such agency actions could not have been taken in retaliation for any subsequent protected activities. These incidents, however, will be dealt with briefly in Part III of this opinion.

communications to his supervisors. Admiral Capone was not only an addressee on one memo, but he also considered both pieces of correspondence as grounds for sustaining charge (3) of the Notice of Proposed Removal of appellant.

As for the two "whistleblowing" events which took place outside the agency, I find Admiral Capone probably knew, and therefore for purposes of this opinion I find that he did know, that appellant was involved in at least one of the events, namely, the appellant's communications to Congressman Steers. The Congressman had requested General Paschall, Director of DCA, to address three issues: two concerning grievances filed by appellant and the other concerning the reliability of PWIN. General Paschall responded by letter on April 20, 1977. *See* exhibit A-19.

At the hearing before MSPB, Admiral Capone testified that he had no recollection of this letter being written to Congressman Steers in answer to appellant's whistleblowing but that he did know General Paschall was responding to a congressional inquiry. (Vol. II, p. 54). Admiral Capone, however, said he remembered the substance of the letter. (Vol. II, p. 53). He also stated that since the congressional inquiry was addressed to WIN, his organization had to provide the information to General Paschall so that he could respond. (Vol. II, p. 53). Admiral Capone would certainly have been familiar with the substance of the reply letter. (Vol. II, p. 53). Since General Paschall's response deals with two grievances filed by appellant as well as the reliability issue, Admiral Capone must have known that appellant was the person who stirred congressional interest in these matters.

With regard to the second act of "whistleblowing," appellant's contacting the National Security Council (NSC) and distributing to it a document which he calls "six management questions" relating to PWIN reliability, there is insufficient evidence in the record to show that Admiral Capone was aware of appellant's involvement. Although

Admiral Capone recalled similar questions because his office assisted in preparing the response, (Vol. II, p. 67), Admiral Capone stated he did not recall knowing who authored the questions. (Deposition, Admiral Capone, March 1981, p. 137). I find that appellant has failed to meet his burden of proving by a preponderance of the evidence that Admiral Capone had actual or constructive knowledge of his involvement in this activity; this activity, therefore, could not have been the basis for retaliation by the agency.

The causal connection between appellant's written criticisms to his supervisors and the subsequent adverse actions is easily demonstrated by the fact that the agency considered this protected conduct as one of the charges supporting its decision to remove the appellant. Further support for finding a causal connection can be gleaned from the time sequence in which these events occurred. They took place on February 25, 1977, and on March 12, 1977. Subsequently, the agency issued three Notices: (1) Denial of Within-Grade Salary Increase on March 21 1977; (2) Warning of Unsatisfactory Performance Rating on May 4, 1977 and (3) Proposed Removal on May 19, 1977. Thus, appellant has met his initial burden under the *Mt. Healthy* test by showing a causal connection as to these instances of alleged retaliation and by establishing that these activities were a significant factor in the decision to remove.

As for the "whistleblowing" outside the agency, the causal connection is not as easily demonstrable. It is difficult for appellant to show that a possible reason for removal which is not admitted by the agency, i.e., appellant's "whistleblowing" to Congressman Steers, played a part in the decision to remove. Such a showing must necessarily rest upon inference.

These communications were in the latter part of April 1977, just prior to the issuance of separate notices, one giving advance notice of a possible unsatisfactory rating, and the other proposing appellant's removal. Considering that the removal notice was issued within one month after

the whistleblowing and that Admiral Capone probably knew of the complaints to Congressman Steers, a causal connection will be inferred. In addition, from the short lapse of time described above, we will infer that these complaints were a significant factor in appellant's removal. However, since Admiral Capone did not know of appellant's contact with NSC, the requisite connection as to that incident cannot be shown.

II. The Mt. Healthy "But-For Test"

Appellant contends that his protected activities were the true reasons for his removal and that if it had not been for them he would not have been dismissed. The agency, on the other hand, has advanced several reasons to show that it would have removed appellant even if his protected activities had not occurred.

Appellant's supervisors were dissatisfied with his job performance long before he engaged in protected activities. Indeed, Dr. Bialick testified that he initially began to work on the removal action in January 1977.[6] (Vol. I, pp. 77-78). The supervisors testified that appellant's removal was necessary because there was a total lack of productivity on appellant's part throughout the year preceding his removal. (Vol. I, p. 79; Vol. III, pp. 139-40, 143; Vol. II, p. 16). Dr. Bialick testified that at one time appellant was a valuable employee and that he was needed (Vol. III, p. 128), but that in his last year appellant either objected to or refused to do the work assigned to him. (Vol. I, p. 79; Vol. II, pp. 99-100).

[6] Dr. Bialick's testimony that he began to work on appellant's removal as early as January 1977 is particularly persuasive. In January, Dr. Bialick was advised that appellant's within-grade increase was due in March 1977 absent an unfavorable performance determination. Chronologically, ninety days before March 1977 would have had to be around January 1977.

The record is replete with instances where Dr. Bialick tried to help appellant improve his performance. In fact, one of Dr. Bialick's subordinates, Mr. Monte Welch, testified that Dr. Bialick "bent over backwards to help appellant become a productive part of the organization". (Vol. IV, p. 126). Repeated meetings were held with appellant to make sure he understood his assignments. Dr. Bialick eventually required appellant to submit occasional progress reports on his work. Appellant's tasks were either never completed or completed incorrectly. Not only was appellant fostering resentment among his fellow employees because he was consuming so much of his supervisor's time (Vol. V, p. 119), but he was also jeopardizing the success of the project on which he worked. (*See* Vol. III, p. 114). Dr. Bialick testified that the charge of inefficiency, i.e., not getting the job done, was the most important consideration in his decision to propose appellant's removal. (Vol. III, p. 129).[7]

Appellant asked most agency witnesses to identify the momentous event which precipitated the decision to remove him. Appellant believes he was promised a period of 90 days to improve his performance, as indicated in the advance warning of unsatisfactory performance rating issued May 4, 1977; that the agency broke its promise when it issued its Notice of Proposed Removal on May 19, 1977, only 15 days into the 90-day warning period; and that the removal, therefore, had to have been the result of improper motives by agency officials, i.e., in response to his having "blown the whistle."

The agency maintains that there was no momentous event which influenced it to propose appellant's removal at

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[7] Specific factual findings concerning appellant's inefficiency were made in the prior initial decision and will not be repeated here. The evidence of performance deficiencies summarized herein will, however, be considered in applying the "but-for test."

that time, but that the various actions were taken in logical progression. In January 1977, Dr. Bialick began to work on appellant's removal. Decisions on the periodic within-grade pay increase and the annual performance appraisal were due soon thereafter and could not be postponed. In order to be consistent with the intent to remove, appellant's supervisors, Dr. Bialick and Mr. Champaign, believed they had to issue a denial of the within-grade salary increase in March 1977 and, later, an unsatisfactory performance notice in May 1977.

Dr. Bialick gave a draft of the proposed removal notice to the Personnel Office in April 1977. Neither Dr. Bialick nor Mr. Champaign could make the removal decision, which was ultimately issued by Admiral Capone on May 19, 1977. The removal action simply overtook the two prior personnel actions, the within-grade denial and the unsatisfactory rating. (Vol. I, pp. 164-66). There was no legal requirement that the removal action be delayed to permit the ninety-day warning period to run its course—that period was prerequisite only to the assignment of an unsatisfactory rating.

Dr. Bialick's initial work on the removal action in January 1977 is particularly significant in that it shows that the intent to remove appellant was clearly expressed prior to appellant's protected activities. This factor alone suggests that the initiation of the removal action was not, and could not have been, a reaction to any of the protected activities.

In addition, Mr. Champaign testified that both he and Dr. Bialick discussed the appellant's removal. (Vol. VI, pp. 59-60). They realized it was a difficult decision for them to make, one which required a great deal of consideration as to whether the recommendation to remove appellant was advisable. *Id.* Mr. Champaign knew that appellant had gone outside the agency to Congress, that appellant's grievance had not yet been resolved, and that appellant had already filed a lawsuit against the supervisors. *Id.* For

these reasons, he believed that appellant might make a claim of reprisal in contesting his removal based on nonperformance and resistance to authority. *Id.* This testimony is relevant because it shows that appellant's supervisors did not make their decision lightly but, rather, appreciated the kind of challenge that might be directed against their action.

Appellant also claims that the agency retaliated against him by choosing the harshest penalty—removal—when there was an alternative to removal, namely, disability retirement. Appellant contends that his supervisors should have recognized he was ill and needed care and treatment (Vol. VII, p. 155). This argument undoubtedly rests on appellant's belief that he was eligible for disability retirement, but this in turn suggests that appellant himself questioned his ability to carry out the responsibilities of his position.

Aside from the inferences that can be drawn from appellant's faulting the agency for its failure to propose disability retirement, his accusation is simply not supported by the facts. Dr. Bialick made a good faith, but unsuccessful, effort to convince agency personnel that appellant had emotional problems and that his disability retirement ought to be initiated. It is also clear that Dr. Bialick's attempt to discuss voluntary disability retirement with appellant was rebuffed.

This issue was discussed in great detail in the Initial Decision of the Field Office. There is no reason to disturb the findings of the presiding official. It appears that the agency did everything it could to propose disability retirement in lieu of removal and that appellant himself refused to cooperate.

III. Remaining allegations of reprisal

Appellant alleges there were other, numerous reprisals taken against him throughout the period of his employment.

These contentions have been fully considered. I find that they are without merit—appellant has, in general, misconstrued his supervisors' actions in dealing with what has been found to be performance failures and resistance to authority. Some examples will be discussed below to illustrate his erroneous perception of his agency's actions.

Since a reprisal—in the context of the present appeal—is a response to a privileged activity, it is clear that there can be no reprisal until the protected activity occurs. In the instant case, the first conceivable protected activity that appears in the record occurred in 1974. That is when appellant registered an informal grievance with Admiral Capone; later, in 1976, he filed a formal grievance.[8] It is evident that appellant's claims of reprisal involving incidents prior to 1974 are irrelevant and will not, therefore, be considered to be instances of reprisal.

It is important, however, to consider an incident which took place prior to appellant's 1974 grievance, for it illustrates the tensions which developed between appellant and his supervisors—tensions which led to the ultimate deterioration of both appellant's performance and his employment relationships. This incident occurred in 1973 when appellant presented the issue of reliability, instead of the topic assigned to him, in a practice briefing prior to a scheduled presentation before the Joint Chiefs of Staff. When one of his supervisors recommended his removal from the project for doing so, appellant viewed this recommendation as retaliation for his emphasis on reliability and construed it to mean that his supervisors were trying to silence him and thereby cover up something. Appellant merely failed to

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[8] Because appellant is pro se and it is unclear whether, or remand, appellant is claiming that reprisals were taken in retaliation for his having filed grievances, it will be assumed for purposes of this opinion that appellant is making such a claim.

It is noteworthy that the presiding official's initial decision in the case *sub judice* found no evidence of reprisal for filing grievances.

follow instructions and it was clearly within management discretion to take action in response to such behavior.

Appellant insists that the agency's failure to prepare an individual development plan (IDP) for him constituted a reprisal action.[9] Appellant was given an IDP form but he refused to complete it because he was unsure as to what management's plans were for him. Dr. Bialick tried to help him fill out the form but appellant refused to state his career goals and what training he thought he needed. Thus, it was appellant's refusal to cooperate rather than any neglect or wrongdoing by the agency which prevented appellant from receiving an IDP.

Appellant also claims that he was excluded from meetings and training. As to training appellant refused to admit that he needed training—he wished to avoid being labelled "deficient." (Vol. IV, p. 96). There were instances where appellant signed up for certain training and then either did not attend or requested that he be excused from attending. (Vol. IV, p. 124, 133). Appellant also requested permission to attend training which was either not directly applicable to his duties or involved travel. (*See* Vol. III, pp. 45-46). Appellant made four requests for training, two of which involved travel to Colorado Springs and Tampa; the two requests were denied due to limited travel funds and shortage of manpower. (Vol. VII, p. 45). It appears, then, that these legitimate management reasons justified the denial of appellant's requests.

Appellant also concluded that Dr. Bialick's actions against him were motivated by Dr. Bialick's financial interest in Computer Sciences Corporation (CSC), a company which had contracts with DCA. Dr. Bialick held stock in that company from the time of his employment with CSC prior to his appointment to DCA. Dr. Bialick first declared his stock holdings before he began working for DCA and

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[9] *See* Initial Decision for detailed discussion of this issue.

continued to report them annually until 1978 when the stock was sold. (Vol. I, pp. 68-69).[10]

The record fails to support appellant's suspicion that Dr. Bialick's financial interest in CSC motivated him to retaliate against appellant for his criticisms of CSC. First, Dr. Bialick's stock holdings represented 24/1000 of 1% corporate ownership (Vol. I, p. 71). Second, it would have been virtually impossible for Dr. Bialick to influence the decision-making process since he played no part in it; his involvement in the CSC contract was limited to administrative and personnel matters, not to report on the contract itself. (Vol. I, pp. 74-77). third, Dr. Bialick testified that he, too, criticized CSC's performance of its contract with DCA. (Vol. I, p. 72). It simply appears that Dr. Bialick could not have been, and was not, motivated to protect CSC.

Appellant's numerous other allegations of reprisal have all been considered and are similarly unfounded. Appellant's characterization of the agency actions as reprisals is properly viewed as the result of his long deteriorating employment relationships and his misinterpretation of management motives.

CONCLUSION

Appellant met his initial burden of demonstrating that his protected conduct, namely, his two intra-agency communications to his supervisors and his "whistleblowing" to Congressman Steers, was a motivating factor in his removal. The agency, however, has shown that appellant's protected activities were not the real reason for his removal but, rather, that it would have removed appellant despite the fact that he engaged in such protected conduct. The agency successfully met its burden by showing that the intent to

[10] Dr. Bialick testified that his stock ownership was reported to the General Counsel of DCA and that his retention of the stock was approved by that office. (Vol. I, p. 69).

remove preceded appellant's protected activities, that appellant's lack of productivity was documented over a period of one year prior to his removal, and that repeated attempts to help appellant improve his performance were to no avail. Therefore, under *Mt. Healthy, supra*, the agency's action in removing the appellant was proper.

DECISION

Wherefore, the action of the Defense Communication Agency in discharging appellant on July 1, 1977 is sustained.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on April 12, 1982, unless a petition for review is filed with the Board within thirty-five (35) calendar days after the issuance of this decision or the Board reopens the case on its own motion.

Any party to this appeal or the Director of Office of the Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specially the exceptions taken to this decision, cite the bases for the exceptions, and refer to applicable law, rule or regulations. A petition filed by the Director must meet the requirements of 5 U.S.C. § 7701(e)(2).

A petition for review shall be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Room 806, Washington, D.C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to establish that:

(a) new and material evidence is available that despite due diligence was not available when the record was closed; or

(b) the decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1), the appellant may petition the United States court of appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board within thirty (30) calendar days after receipt of the decision.

John J. McCarthy
Chief Administrative Law Judge

March 8, 1982

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Initial Decision on Reconsideration on the appeal of JOHN H. BRADLEY were served this date by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

JOHN H. BRADLEY
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HONORABLE DONALD J. DEVINE
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and by
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MAIL to:

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Doretha Bonds
Legal Clerk

March 8, 1982

APPENDIX F

FIRST AMENDMENT, UNITED STATES CONSTITUTION

"Congress shall make no law . . . abridging the freedom of speech . . . or to petition the Government for a redress of grievances."

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

"No persons shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

UNITED STATES CODE, TITLE 5, SECTION 4304(b)

"An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory."

Section 4305(c) . . . "In addition to the review under subsection (a) of this section, an employee with a current performance rating of less than satisfactory, on written appeal to the chairman of the appropriate board of review established under subsection (b) of this section, *is entitled to a hearing and decision on the merits of the appealed rating.*" (Emphasis added.)

Section 4305(d) . . . "*At the hearing* the appellant, or his designated representative, and representatives of the agency are entitled to submit pertinent information orally or in writing, and to hear or examine, and reply to, information submitted by others. *After the hearing*, the board of review shall confirm the appealed rating or make such change as it considers proper." (Emphasis added.)

CODE OF FEDERAL REGULATIONS, TITLE 5, SECTION 771.110 (1976)

Section 771.110 Avoidance of delay.

(a) An agency shall give each grievance full, impartial, and prompt consideration and shall require that the deci-

sion on a grievance be issued within 90 days after initiation of the informal procedure established under Sect. 771.112.

(b) To insure orderly processing, an agency shall establish time limits for . . .

(4) completion of the examiner's inquiry; and

(5) Issuance of the decision after completion of the examiner's inquiry.

CODE OF ETHICS FOR GOVERNMENT SERVICE, House Concurrent Resolution 175, 85th Congress, 2d Session.

"Any person in Government Service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department."

OLIPHANT



'Well, dammit, that's not what this print-out says!'

APPENDIX G

THE WASHINGTON POST
NOVEMBER 11, 1979

Soviets Denounce U.S. Missile Alert Error

MOSCOW, Nov. 10 (AP)—The Soviet news agency Tass said today that another computer error like the one which caused a false missile alert in the United States could have "irreparable consequences" for the world.

The North American Air Defense Command in Colorado warned of an attack by Soviet missiles for six minutes yesterday when, according to the Pentagon, "a test tape was loaded into . . . a computer as part of a computer test. The tape simulated a missile attack against North America," and resulted in 10 U.S. and Canadian jet interceptors being sent aloft.

Tass said the Pentagon was having trouble reassuring people about the episode.

"No matter how hard the Pentagon spokesman tried to assure newsmen, they were not soothed by his statements," Tass reported from Washington. "In reporting the incident, the press said that such an 'error' may lead to fatal consequences.

"*Another 'error' by the computer might have irreparable consequences for the whole world,*" Tass said.

THE WASHINGTON STAR
NOVEMBER 16, 1979

U.S. False Alert Deliberate, Tass Says

MOSCOW—Tass military commentator Alexander Dmitryuk suggested yesterday that the Pentagon may have set off a false alarm about a Soviet nuclear attack deliberately to test Moscow's reaction. Dmitryuk also charged that there were other false alarms in the United

States "at the end of the 1950s and 1960s, and each could have ended in a catastrophe."

THE WASHINGTON POST
THURSDAY, OCTOBER 30, 1980

147 False Alarms Of Missile Attacks In Last 18 Months

United Press International

The nation's missile warning system is so delicate it produced 147 false indications of a Soviet missile attack on the United States during the last 18 months, a Senate report said yesterday.

The vast majority of these alarms were quickly dismissed as erroneous, the report said. But four incidents—two of them not previously acknowledged—resulted in orders to strategic forces to increase their state of alert.

The report by Sens. Gary Hart (D-Colo.) and Barry Goldwater (R-Ariz.) to the Senate Armed Services Committee predicted false alarms will continue, and urged improvements in the complex system.

But it noted, "In no way can it be said that the United States was close to unleashing nuclear war" as a result of past false alarms. The system has never forced the president and top military aides to convene an extraordinary meeting to seriously consider retaliation against the Soviets, it said.

"In a real sense, the total system worked properly in that even though the mechnical electronic part produced erroneous information, the human part correctly evaluated it and prevented any irrevocable reaction," the report said.

Information from U.S. satellites that detect hot missile exhaust with infrared sensors is reported to the North American Air Defense Command in Colorado.

The two incidents not previously reported:

• On March 15, 1980, a Soviet submarine fired four missiles in waters near the Kurile Islands north of Japan. One missile generated an unusual exhaust pattern, possibly caused by a malfunction.

• On Oct. 3, 1979, an early warning radar at Mount Hebo, Ore., detected a decaying rocket body and generated a false launch and impact report.